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EDITOR'S NOTE

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. 85-1027-CSY
atus: GRANTED

Title: Arizona, Petitioner
v.
James Thomas Hicks

cketed:
cember 13, 1985

Court: Court of Appeals of Arizona, Division One

Counsel for petitioner: Twist, Steven J., Akers, Linda Ann Gilbertson

Counsel for respondent: Rood III, John William

try	Date	Note	Proceedings and Orders
1	Dec 13 1985	G	Petition for writ of certiorari filed.
2	Jan 17 1986		Brief of respondent James Thomas Hicks in opposition filed.
3	Jan 17 1986	G	Motion of respondent for leave to proceed in forma pauperis filed.
4	Jan 29 1986		DISTRIBUTED. February 21, 1986
6	Mar 3 1986		REDISTRIBUTED. March 7, 1986
8	Mar 12 1986		REDISTRIBUTED. March 21, 1986
10	Mar 31 1986		REDISTRIBUTED. April 4, 1986
11	Apr 7 1986		Motion of respondent for leave to proceed in forma pauperis GRANTED.
12	Apr 7 1986		Petition GRANTED.
			**********
13	Apr 21 1986	G	Motion of respondent for appointment of counsel filed.
14	Apr 30 1986		DISTRIBUTED. May 15, 1986. (Motion of respondent for appointment of counsel).
15	May 19 1986		Motion for appointment of counsel GRANTED and it is ordered that John William Rood, III, Esquire, of Phoenix, Arizona, is appointed to serve as counsel for the respondent in this case.
17	May 20 1986	G	Motion of Americans for Effective Law Enforcement, Inc., et al. for leave to file a brief as amici curiae filed.
18	May 21 1986		Joint appendix filed.
19	May 21 1986		Brief of petitioner Arizona filed.
20	Jun 2 1986		Motion of Americans for Effective Law Enforcement, Inc., et al. for leave to file a brief as amici curiae GRANTED.
21	Jun 13 1986		Record filed.
23	Jun 23 1986		Order extending time to file brief of respondent on the merits until July 21, 1986.
24	Jun 30 1986		Application for bail filed (A-1027), and order denying same by White, J., on July 3, 1986.
26	Jul 21 1986		Brief amicus curiae of ACLU filed.
27	Jul 21 1986		Brief of respondent filed.
28	Sep 22 1986		CIRCULATED.
29	Oct 6 1986		SET FOR ARGUMENT. Monday, December 8, 1986. (4th case) (1 hour).
30	Nov 20 1986	X	Reply brief of petitioner Arizona filed.
31	Dec 8 1986		ARGUED.

PETITION FOR WRIT OF CERTIORARI

85-1027

Supreme Court, U.S.
FILED
DEC 13 1985
JOSEPH F. SPANIOL, JR.
CLERK

NO. 85-____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1985

STATE OF ARIZONA,

Petitioner,

-vs-

JAMES THOMAS HICKS,

Respondent.

ON WRIT OF CERTIORARI TO THE
ARIZONA COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

UNDER THE PLAIN VIEW EXCEPTION TO THE FOURTH AMENDMENT, CAN POLICE SEIZE IDENTIFICATION NUMBERS FROM EVIDENCE INADVERTENTLY FOUND IN THE COURSE OF CONDUCTING A LAWFUL SEARCH WHERE POLICE CAN POINT TO PARTICULARIZED, ARTICULABLE FACTS AND REASONABLE INFERENCES DRAWN THEREFROM WHICH LEAD THEM TO BELIEVE THAT THE EVIDENCE IS INCRIMINATING?

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OPINION BELOW

The Arizona Court of Appeals' 1985 opinion holding that the recording of serial numbers from a suspicious stereo unit, unrelated to the exigency justifying entry, involved an additional unlawful search not necessitated by the exigency is reported at _____Ariz._____, 707 P.2d 331 (Ct. App. 1985). It is appended here as Exhibit "A". The order of the Arizona Court of Appeals denying the State's Motion for Reconsideration and the order of the Arizona Supreme Court denying the State's Petition for Review are appended as Exhibits "B" and "C", respectively.

STATEMENT OF JURISDICTION

The State of Arizona appealed the November 20, 1984, superior court order suppressing all evidence except drug paraphernalia, to the Arizona Court of Appeals pursuant to Arizona Revised

Statutes Annotated § 13-4032(7). The Arizona Court of Appeals had jurisdiction to hear the appeal pursuant to Arizona Revised Statutes Annotated §§ 12-120.21(A)(1), 13-4031, and 13-4032. The Court of Appeals affirmed the superior court's order suppressing the evidence in an opinion filed June 20, 1985. The State's subsequent Motion for Reconsideration was denied on July 18, 1985. The State then petitioned the Arizona Supreme Court for review of the Court of Appeals opinion under Rule 31.19, Arizona Rules of Criminal Procedure. The Arizona Supreme Court denied the petition on October 16, 1985. This petition was filed within 60 days of that denial. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

The pertinent part of Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated,....

The pertinent part of the Fourteenth Amendment to the United States Constitution provides:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; ....

STATEMENT OF THE CASE

On April 18, 1984, a bullet, fired through the floor of Apartment #10 at 13024 North 22nd Street, Phoenix, Arizona, struck and injured a man in the apartment below. Officers of the Phoenix Police Department responded to the call. A neighbor informed officers that just as the victim's wife ran screaming from the apartment below, a man came out onto the balcony of the apartment above, looked over the railing and then reentered the

apartment. The apartment complex manager unlocked Apartment #10 to admit Phoenix Police officers. Officers entered to look for other injured parties, the assailant, and his weapon.

Upon searching the apartment, officers found a .25 caliber automatic in plain view on the living room floor, a make-shift mask, and a .45 caliber automatic together with a sawed-off .22 caliber rifle and banana clip under the mattress of a bed. In the course of the search, Officer Nelson observed very expensive stereo equipment in the living room and bedroom. The apartment was otherwise in a low-rent area, ill-kept, and littered with drug paraphernalia and alcoholic beverage containers. These observations, together with the officer's twelve years of police experience, caused Officer Nelson to suspect that the expensive, out-of-place stereo components were the fruits of a crime.

Officer Nelson obtained the serial numbers from a stereo turntable found in plain view. This required that he move or turn the stereo and write down the serial numbers. Officer Nelson then called the National Crime Information Computer (NCIC) from the apartment. The computer operator informed Nelson that the turntable had been reported stolen. Officer Nelson then seized the .25 caliber automatic, the .45 caliber automatic, the sawed-off .22 caliber rifle, and the turntable.

Officer Nelson returned to the police substation to obtain the departmental report referenced by NCIC. The report indicated that the turntable and other stereo components left in defendant's apartment had been taken in an armed robbery on March 29, 1984.

Officer Nelson then relayed the above described circumstances, including the circumstances of the shooting, to Officer

Russler of the Phoenix Police Department. Officer Russler independently reviewed the armed robbery report and compared the serial numbers of the stereo components listed as stolen with the numbers on the turntable seized by Officer Nelson and other components left in the apartment. Officer Russler incorporated the information from Officer Nelson and the robbery report into a search warrant affidavit. An independent magistrate issued a warrant based on the affidavit. Officer Russler served and executed the warrant on defendant's apartment several hours after the shooting.

Evidence seized pursuant to the warrant included drugs, drug paraphernalia, a box for a police scanner and information regarding the police scanner, make-shift masks, bandanas, handcuffs, .357 caliber ammunition, .22 caliber ammunition, .45 caliber ammunition, a sword, various items

of identification belonging to defendant and verious other persons, and the stereo components taken in the March 29, 1984 armed robbery.

On May 3, 1984, the Maricopa County Grand Jury indicted defendant, James Hicks, on charges of armed robbery and kidnapping, each class 2 dangerous felonies under the Arizona Criminal Code. Thereafter, defendant filed a motion to suppress all items seized from Apartment #10, 13024 North 22nd Street, on April 18, 1984. Defendant claimed that the entry into his apartment and search without a warrant violated his Fourth Amendment rights. The state responded that the entry was justified by exigent circumstances and that the officers had the right to seize fruits of a crime in plain view once lawfully in the apartment. Defendant argued that Coolidge v. New Hampshire, 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971) set forth

three basic requirements which must be met before the plain view exception to the Fourth Amendment is applicable. While conceding that the initial entry was lawful, defendant maintained that discovery of the stereo was not inadvertent because officers had been in the apartment for some time conducting a search for additional injured parties, suspects and weapons, and the incriminating nature of the evidence was not immediately apparent because the stereo itself did not appear stolen.

On November 7, 1984, Maricopa County Superior Court held an evidentiary hearing on the pending motion to suppress. At that hearing, defendant conceded that he was not challenging the affidavit or the warrant, or the execution of the warrant. The state acknowledged that defendant was the lessee of Apartment #10, and as such

was responsible for payment of the lease and utilities. Officer Nelson testified that the reason he checked the serial numbers on the stereo equipment was:

> [b]ecause it was an item of value. In over twelve years of police experience I know those things are stolen a lot and I just decided to check the serial numbers.

Nelson told the court that he had also found a mask, illegal weapons, and recognized the name of one tenant from police work. However, he did not know the stereo turntable was stolen until he had verified the serial number. After additional argument, Maricopa County Superior Court granted the motion to suppress and the State appealed.

REASONS FOR GRANTING THE WRIT

Review should be granted to decide an important and recurring issue of constitutional law: whether police can seize identification numbers from evidence

inadvertently found in the course of conducting a lawful search where the police can point to particularized, articuable facts and reasonable inferences drawn therefrom which lead them to believe the evidence is incriminating. This issue has not heretofore been settled by this Court. In Texas v. Brown, 460 U.S. 730, 741-42, 103 S.Ct. 1535, 1542, 75 L.Ed.2d 502, 513 (1983), this Court reserved in footnote seven the issue of:

> whether, in some circumstances, a degree of suspicion lower than probable cause would be a sufficient basis for a seizure in certain cases.

The Arizona Court of Appeals has strictly irterpreted the Fourth Amendment of the United States Constitution to preclude a seizure of an identification number from an article in plain view, when the seizure is not necessitated by the exigency justifying the officer's presence. In the case at bar, an officer

of the Phoenix Police Department recorded the serial numbers from a stereo unit in plain view. The state submits that this was not a search as characterized by the Court of Appeals, but rather a seizure within the scope of the plain view doctrine announced in Coolidge v. New Hampshire, 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971).

In Coolidge, this Court set forth three requirements which must be met before the plain view exception to the Fourth Amendment is applicable: 1) the initial intrusion which afforded authorities the plain view must be lawful; 2) the discovery of the evidence must be inadvertent; and 3) the incriminating character of the article must be immediately apparent to searching authorities. The only issue in dispute herein is whether the incriminating nature of the stereo was immediately apparent to

searching authorities.

Both parties concede that exigent circumstances justified Phoenix Police officers entering defendant's apartment to investigate a shooting in the apartment below. Upon entering, they discovered weapons, drugs, masks, and unexpectedly, an expensive stereo unit in plain view. Considering the evidence in context, Officer Nelson believed the stereo could be stolen property. He therefore seized the serial number from the back or bottom of the machine to investigate further.

The "immediately apparent" language does not mean that an officer must be "possessed of near certainty as to the seizable nature of the items," all that is required for a plain view seizure is "probable cause to associate the property with criminal activity." Texas v. Brown, 460 U.S. at 741-742, 103 S.Ct. at 1542-1543, 75 L.Ed.2d at 513. Probable cause requires:

> that the facts available to the officer would 'warrant a man of reasonable caution in the belief,' that certain items may be contraband or stolen property or useful as evidence of a crime; it does not demand any showing that such a belief be correct or more likely true than false. A 'practical, nontechnical' probability that incriminating evidence is involved is all that is required.

Id. 460 U.S. at 742, 103 S.Ct. at 1543, 75 L.Ed.2d at 514 (citations omitted).

Here the officer believed that the incriminating nature of the stereo was immediately apparent upon the following facts. First, the article was out of context with its surrounding environment, i.e., the expensive stereo unit was in a squalid, ill-kept apartment. Secondly, the officer knew through experience that stereos are frequently stolen, and the apartment contained guns and homemade cut-out masks of the type that are frequently used in robberies and burglaries. Finally, the officer

recognized the name of the man on the balcony as one discussed at the police station in connection with criminal activity. This belief warranted further investigation, if not seizure of the property.

The reasonable suspicion standard has been applied in a number of contexts and effects a needed balance between the private and public interest when law enforcement officials must make a limited intrusion on less than probable cause. United States v. Montoya de Hernandez, 473 U.S. _____, 105 S.Ct. 3304, 87 L.Ed.2d 381 (1985). It permits searches and seizures where officials have a particularized objective basis for suspecting criminal activity which does not rise to the level of probable cause.

The seizure of serial numbers from an item of personalty is the least obtrusive governmental intervention in a possessory

interest. Assuming that investigating officers are conducting a lawful search and inadvertently find suspicious property, they do not have to ignore their common sense conclusions drawn from particular facts.

Admittedly officers must have more than an inchoate and unparticularized suspicion or hunch. However, where police can point to particularized articulable facts and reasonable inferences drawn therefrom, they should be permitted to take further identifying numbers to confirm or deny their suspicions.

At present, an anomoly exists in the law. Officers may stop and request identification from individuals whom they suspect are involved in criminal activity on less than probable cause, United States v. Hensley, _____U. S. _____, 105 S.Ct. 675, 679, 83 L.Ed.2d 604, 610 (1985), but they cannot obtain such

information from an inanimate object, even though this is far less intrusive than accosting a human being and demanding that he produce identification. The state is not suggesting a further intrusion upon individual privacy, but where police are conductirg a lawful search, and inadvertently discover suspicious property, under the totality of the circumstances, they should be able to investigate further.

Should this Court decline to grant certiorari in this matter, the state requests that this Court hold the instant case in abeyance pending a decision in New York v. Class, No. 84-1181, argued November 4, 1985. Class presents a similar issue concerning the seizure of vehicle identification numbers upon less than probable cause.

CONCLUSION

The plain view exception should be modified to permit police officers to seize identifcation numbers from evidence inadvertently found in the course of conducting a lawful search, where police can point to particularized, articulable facts and reasonable inferences drawn therefrom which lead them to belie e the evidence is incriminating. The seizure of serial numbers is the least obtrusive governmental intervention in the possessory interest, and represents an appropriate balance between the private and public interest in the recovery of stolen property.

Respectfully submitted,

ROBERT K. CORBIN
Attorney General

STEVEN J. TWIST
Chief Counsel
Organized Crime and
Racketeering Division
Linda A. Akers
LINDA A. AKERS
Assistant Attorney General

Attorneys for PETITIONER

A F F I D A V I T

STATE OF ARIZONA)
) ss.
COUNTY OF MARICOPA)

LINDA ANN GILBERTSON AKERS, a member of the Bar of this Court, being duly sworn upon oath, deposes and says:

That she served three copies of the Petition for Writ of Certiorari upon John Rood, Deputy Public Defender, 132 South Central, Second Floor, Phoenix, Arizona 85005, Attorney for James Thomas Hicks, by depositing the same in the United States Mail, with first class postage prepaid, return receipt requested.

Additionally, as a courtesy, she herewith certifies that service of three copies of this petition has been made upon the United States of America by depositing the same in the United States Mail, with first class postage prepaid,

addressed to the Solicitor General, Department of Justice, Washington, D.C. 20530.

Linda A. Akers

LINDA ANN GILBERTSON AKERS
Assistant Attorney General
Department of Law
1275 West Washington
Phoenix, Arizona 87007
Telephone: (602) 255-3881

SUBSCRIBED AND SWORN to before me this 12th day of December 1985.

Paula J Burnam
NOTARY PUBLIC

My Commission Expires:

1-13-86

APPENDICES

APPENDIX A

The STATE OF ARIZONA, Appellant,

v.

James Thomas HICKS, Appellee

No. 1 CA-CR 8573.

Court of Appeals of Arizona

Division 1

June 20, 1985

Reconsideration Denied July 18, 1985

Review Denied October 16, 1985

Defendant's motion to suppress evidence seized from his apartment was granted by the Superior Court, Maricopa County, Cause No. CR-140258, Elizabeth Stover, J. and State appealed. The Court of Appeals, Livermore J., held that: (1) officers' initial entry into defendant's apartment and search for weapons, other victims, and individual who had shot through floor, striking victim in apartment below, was justified by exigencies of situation; (2) officers' recording of serial numbers of stereo components was unlawful as involving an additional search not necessitated by exigency justifying initial entry; and (3) fact that officer subsequently obtained search warrant did not validate his actions under good-faith exception to exclusionary rule.

Affirmed.

1. Searches and Seizures - Key No. 3.3(1)

Officers' initial entry into defendant's apartment and search for weapons, other victims, and individual who had shot through floor, striking victim in apartment below, was justified by exigencies of situation.

2. Searches and Seizures - Key No. 3.3(1)

When random shooting can be traced to particular location immediately after its occurrence, police need not delay to obtain warrant; they can reasonably believe that others may have been shot or may be in peril and that weapons that could be used against them may be found.

3. Searches and Seizures - Key No. 3.3(1)

Warrantless search must be strictly circumscribed by exigencies which justify its initiation.

4. Searches and Seizures - Key No. 3.3(1)

Right to make warrantless entry for one purpose is not enlarged to allow a

general rummaging through a person's effects however suspicious they may appear to entering officer.

5. Searches and Seizures - Key No. 3.3(1)

Officers' actions in recording serial numbers of expensive stereo components found in defendant's apartment was unlawful as being unrelated to exigency justifying initial entry of defendant's apartment, from which shot was fired, striking victim in the apartment below, and as involving an additional search not necessitated by such exigency, even though officers' suspicions were aroused upon seeing expensive components which he believed to be out of keeping with otherwise "mean" nature of furnishings.

6. Searches and Seizures - Key No. 3.3(8)

Fact that officer subsequently obtained a search warrant did not validate his prior actions, under good faith exception to exclusionary rule, in

recording serial numbers of stereo components found in defendant's apartment, where such actions were not necessitated by exigency justifying initial entry.

A.R.S. S 13-3925

Robert K. Corbin, Atty. Gen. by Steven A. Lamar, Phoenix, for Appellant.

Ross P. Lee, Maricopa County Public Defender by John W. Rood, III, Phoenix, for appellee.

OPINION

LIVERMORE, Judge

On April 18, 1984, police officers responded to a shooting at an apartment in North Phoenix. The victim had been shot through the floor from the apartment above. The officers were admitted to that apartment by the manager of the complex. In a quick search, they determined that no people were in the apartment. They did, however, seize several weapons. One of the officers, on seeing expensive stereo components which he believed to be out of keeping with the otherwise mean nature of the furnishings, became suspicious that those components were stolen. He moved the components so that he could locate and record the serial numbers. On checking by computer and department reports, he learned that these components had been taken in an armed robbery. These facts were presented in an affidavit, a search

warrant issued, and the components were subsequently seized. The state appeals from the suppression of that evidence.

[1,2] The parties are agreed that the initial entry into defendant's apartment, although warrantless, was legal. The exigencies of the situation demanded it. When a random shooting of this nature, immediately after its occurrence, can be traced to a particular location, police need not delay to obtain a warrant. They can reasonably believe that others may have been shot or may be in peril and that weapons that could be used against them may be found. This justified the entry and the search for the shooter, weapons, and other possible victims. Mincey v. Arizona, 437 U.S. 385, 98 S.Ct. 2408, 57 L.Ed.2d 290 (1978).

[3-5] Mincey also teaches, however, that a "warrantless search must be 'strictly circumscribed by the exigencies which

justify its initiation' Terry v. Ohio, 392 U.S. [1] at 25-26, 88 S.Ct. [1898] at 1882 [20 L.Ed.2d 889 (1968)". Id. at 393, 98 S.Ct. at 2413, 57 L.Ed.2d at 300. The right to enter for one purpose is not enlarged to allow a general rummaging through a person's effects however suspicious they may appear to the entering officer. The recording of the serial numbers was unrelated to the exigency justifying entry and involved an additional search not necessitated by the exigency. It was plainly unlawful. State v. Smith, 122 Ariz. 58, 593 P.2d 281 (1979).

[6] The state argues that because the officer subsequently obtained a search warrant that his actions ought to be validated under the "good-faith" exception to the exclusionary rule. The state cites A.R.S. § 13-3925 and United States v Leon, ___U. S. ___, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984). Neither is

applicable. The statute simply does not speak to this situation. And, while Leon does hold that officers may reasonably rely on a magistrate's assessment of probable cause in issuing a warrant and that exclusion need not be ordered if the magistrate is wrong in that assessment, it does not hold that a subsequent warrant validates an earlier illegal search. Police officers cannot launder their prior unconstitutional behavior by presenting the fruits of it to a magistrate.

The order of suppression is affirmed.

HATHAWAY, P. J. and LACAGININA, J.,

Note: This cause was decided by the Judges of Division Two as authorized by A.R.S. § 12-120(E).

APPENDIX B

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,	)	
	)	
Appellant,	)	CA-CR 8573
	)	
	)	
-vs-	)	ORDER
	)	
	)	
JAMES THOMAS HICKS,	)	MARICOPA COUNTY
	)	Superior Court
Appellee.	)	Cause No.CR-140258

IT IS ORDERED that Appellant's Motion for Reconsideratioon is DENIED.

Dated: July 18, 1985

James D. Hathaway
JAMES D. HATHAWAY
Judge

APPENDIX C

SUPREME COURT
STATE OF ARIZONA
201 West Wing State Capital
1700 West Washington
Phoenix, Arizona 85007 2866

Telephone (602) 255-4536

October 17, 1985

RE: STATE vs. JAMES THOMAS HICKS
Supreme Court No. 6680-PR
Court of Appeals No. 1 CA-CR 8573
Maricopa County No. 140258

GREETINGS:

The following action was taken by the Supreme Court of the State of Arizona on October 16, 1985, in regard to the above-referenced cause:

"ORDERED" Petition for Review = DENIED."

DAVID R. COLE, Clerk

LAA:sc/4359e

OPPOSITION

BRIEF

ORIGINAL

Supreme Court U.S.
FILED
JAN 17 1986
JOSEPH F. SPANIOL, JR.
CLERK

IN THE SUPREME COURT
OF THE
UNITED STATES

October Term of 1985

No. 85-1027

STATE OF ARIZONA,

Petitioner,

vs.

JAMES THOMAS HICKS,

Respondent.

ON WRIT OF CERTIORARI TO THE ARIZONA COURT OF APPEALS

BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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Attorney for Respondent

QUESTIONS PRESENTED

Did the Arizona Court of Appeals correctly hold the recording of serial numbers on a stereo component in a search unrelated to circumstances justifying the original search of a residence as violative of the Respondent's Fourth Amendment rights?

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STATEMENT OF THE CASE

The Respondent will rely on the facts as annunciated in the Court of Appeals decision reported at State v. Hicks, ____ Ariz. ____, 707 P.2d 331 (Court of Appeals 1985) and appended to the Petition for Writ of Certiorari as Appendix A. Where appropriate, in argument, Respondent will supplement those facts.

JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. § 1257 (3).

ARGUMENT

THE TRIAL COURT ACTED CORRECTLY IN GRANTING THE RESPONDENT'S MOTION TO SUPPRESS ITEMS SEIZED AS A RESULT OF AN ILLEGAL SEARCH OF A STEREO TURNTABLE.

Initially, Respondent would state that the issue presented in the Petition for Writ of Certiorari is unlike that previously presented in the state courts. The State of Arizona in its original brief, presented the question in this manner:

> The trial court erred in suppressing evidence seized from appellee's apartment by Phoenix Police Officers acting in a good-faith, objectively reasonable reliance on a warrant issued by a detached and neutral magistrate.

The main basis for the State's position was that after the legal entry into the residence, noted in the State's presentation of the facts, police officers were able to obtain a warrant for the search of the residence and, therefore, the State argued, pursuant to this Court's decision in United States v. Leon, ____ U.S. ____, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984) and a newly enacted statute in the

state of Arizona (A.R.S. § 13-3925), all matters seized were seized pursuant to a good-faith exception to the exclusionary rule.

The Court of Appeals distinctly stated in its decision that the statute and Leon, supra, are not applicable.

> ...officers may reasonably rely on a magistrate's assessment of probable cause in issuing a warrant and that exclusion need not be ordered if the magistrate is wrong in that assessment, it does not hold that a subsequent warrant validates an earlier illegal search. Police officer's cannot launder their prior unconstitutional behavior by presenting the fruits of it to a magistrate.
>
> (Hicks, supra, 707 P.2d at 333).

Now the State of Arizona has petitioned this Court questioning whether or not the police may, in fact, take an item in "plain view," turn it upside down, copy its identification number and in effect seize that number during the act of conducting a lawful search of other areas of a residence.

It is a well-grounded principle of law that searches and seizures inside a home without a warrant are presumed unreasonable. Payton v. New York, 445 U.S. 573, 100 S.Ct. 1371, 63 L.Ed.2d 639 (1980). As the Arizona courts have stated, specifically in State v. Martin, 139 Ariz. 466, 679 P.2d 489 (1984), the Arizona Constitution is even more explicit than the Fourth Amendment in safegarding this fundamental liberty.

> No person shall be disturbed in private affairs, or his home invaded, without authority of law.
>
> (Arizona Constitution, Article 2, Section 8).

The Respondent as well as the Court of Appeals agreed that the initial entry into the apartment was based on exigent circumstances and was therefore legal. Coolidge v. New Hampshire, 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971), and Mincey v. Arizona, 437 U.S. 385, 98 S.Ct. 2408, 57 L.Ed.2d 290 (1978). It is clear, though, that the stereo equipment seen by Officer Nelson was not evidence

or fruits of a crime and the fact that Officer Nelson either picked up or turned over the turntable to discern the serial number was improper. Once Officer Nelson and the other officers who were in the apartment, determined that there was no suspect on the premise nor that anyone's life or health was endangered or that evidence of the shooting would be destroyed, any further searches should have been haulted. This was not the case and, in fact, Officer Nelson, based on what he considered his expertise in criminal investigation, without further basis, decided to check the serial number of the stereo equipment. The Petitioner now argues in this Court that that seizure was lawful.

Petitioner cites this Court's decision in Texas v. Brown, 460 U.S. 730, 103 S.Ct. 1535, 75 L.Ed.2d 502 (1983) for the proposition that under some circumstances a seizure may be lawful where the police officer's degree of suspicion is lower than probable cause and the police can point to particularized articuable facts and reasonable inferences drawn therefrom, which lead them to believe the evidence is incriminating. The probable cause used by the Petitioner is that under the "immediately apparent" language of Coolidge, supra, in regard to the incriminating character of the evidence is that the officer was able to point out that this was an ill-kept apartment wherein he felt an "expensive" stereo unit was out of place. In addition, the officer knew that stereos are frequently stolen and that he recognized the name of a man involved in the original search as one connected with criminal activity. The Petitioner cites these facts to validate the search. It says that this minor intrusion, based on less than probable cause, is reasonable when balancing privacy rights and the public's interest in law enforcement. Further, the Petitioner cites United States v. Hensley, ____ U.S. ____, 105 S.Ct. 675, 83 L.Ed.2d 604 (1985) for the proposition there exists an anomaly in the law wherein officers may stop and request identification from individuals on less than probable cause but cannot obtain information from what they term "inanimate objects" on less than probable cause.

Hensley, supra, is a wholly different fact situation and falls within the dictates of Terry v. Ohio, 392 U.S. 1, 88 S.Ct.1868, 20 L.Ed.2d 889 (1968) on which this Court has consistently held that under limited circumstances the police may stop persons in the absence of probable cause. Hensley dealt with stopping a vehicle and its occupants based on an officer's reasonable suspicion that the driver was involved in a completed crime. There is no such suspicion in this case that can be reasonably articulated. In fact, this was simply a subjective opinion by the police officer as to whether or not individuals living in that residence could have property which was quite ordinary or whether it was stolen property and based on mere suspicion, take that property, obtain serial numbers off it and then request a telephonic search warrant for that property.

In addition, Hensley, Terry and Texas v. Brown, all involve cases where the potential for losing evidence was high, because of the mobility of the individuals involved. In this case no such emergency existed, and if in fact there was sufficient probable cause to search the remaining portion of the apartment a valid warrant could have been obtained prior to the search of the stereo. In another case cited by the Petitioner, United States v. Montoya de Hernandez, 473 U.S. ____, 105 S.Ct. 3304, 87 L.Ed.2d 381 (1985), the Petitioner says the reasonable suspicion standard has been applied in a number of contexts wherein enforcement officials must make limited intrusions on less than probable cause. That case specifically involves an area of law wherein this Court has granted a much wider latitude in searches in as much as there is much less of an expectation of privacy on the border.

The Petitioner freely admits that the police officers must have more than a mere suspicion or hunch, but that in the case at bar the facts articulated are reasonable and therefore the inferences are reasonable and should allow them to be permitted to take further steps in identifying contraband. What the Petitioner

fails to say is that the articulated facts in the case at bar are not reasonable and that as the Court of Appeals stated that the mere fact that a police officer has a right to enter a residence for one purpose is not sufficient to allow that officer to enlarge his search so as to allow a "general rummaging though a person's effects however suspicious they may appear to the entering officer." (707 P.2d at 333).

The officer's mere hunch was insufficient to provide probable cause or a reasonable suspicion for an intrusion into an individuals property.

In fact, Respondent would argue that the item seized was not in plain view of the officer. The facts as presented thoughout have shown that the officer had to seize the stereo component to determine the serial number which the Petitioner states to this Court was the matter which was seized in plain view. It now asks this Court to modify the plain view exception to the Fourth Amendment to allow officers to seize identification numbers from evidence which it says may be inadvertently found in the course of a lawful search. The reasoning is that the seizure of the serial numbers is the least obtrusive governmental intervention in a possessory interest and balances the private and public interests in the recovery of stolen property. What the Petitioner fails to state is that the serial number in this case was not in plain view and in fact the police officer had to make a concerted effort to determine what the serial number was.

Further as the Arizona Court of Appeals reasoned, a legal search cannot and should not become a general "rummaging" through a person's private possessions based on mere hunches and then justified as the "least obtrusive of governmental intrusions." The Fourth Amendment has set standards which this Court has upheld and in those instances where legitimate interests exist has found narrow, strictly construed exceptions. The case herein is not one of those instances. The plain view exception of Coolidge, supra, has been sufficiently fleshed out to cover all legitimate government interests.

CONCLUSION

In the case at bar the Court should deny the Petition for Writ of Certiorari in as much as the Arizona Court of Appeals correctly determined that the search of the stereo component was plainly unlawful and does not fall within the plain view exception of the Fourth Amendment.

Even should police officers point to particularized articuable facts and reasonable inferences drawn from evidence seen in plain view, the seizure of that evidence based on less than probable cause and on mere hunch should not be considered by this Court in modifying its plain view exception.

Respectfully submitted this 17 day of January, 1986.

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Maricopa County Public Defender

By James H. Kemper
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Attorneys for RESPONDENT

JOINT

APPENDIX

Supreme Court, U.S.
FILED
MAY 21 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-1027

In the Supreme Court of the United States

OCTOBER TERM, 1985

STATE OF ARIZONA, PETITIONER

v.

JAMES THOMAS HICKS, RESPONDENT

ON WRIT OF CERTIORARI TO THE
ARIZONA COURT OF APPEALS

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED DECEMBER 12, 1985
CERTIORARI GRANTED APRIL 7, 1986

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

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The opinion of the Arizona Court of Appeals affirming the Superior Court's suppression order may be found in Appendix "A", pages 21-29 of the Petition for Certiorari.

LIST OF RELEVANT DOCKET ENTRIES

May 3, 1984	—Indictment
July 26, 1984	—Motion to Suppress
November 20, 1984	—Order Granting Motion to Suppress
November 28, 1984	—Dismissal of Charges Without Prejudice
November 28, 1984	—State's Notice of Appeal
June 30, 1985	—Opinion of Arizona Court of Appeals
July 1, 1985	—Motion for Reconsideration
July 18, 1985	—Order Denying Motion for Reconsideration
August 1, 1985	—Petition for Review
October 16, 1985	—Order Denying Petition for Review
October 21, 1985	—Order and Mandate
December 12, 1985	—Petition for Certiorari Filed
April 7, 1986	—Certiorari Granted

IN THE SUPERIOR COURT
OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF MARICOPA

No. CR140258

STATE OF ARIZONA, PLAINTIFF

VS.

JAMES THOMAS HICKS, DEFENDANT

MOTION TO SUPPRESS

Defendant, James T. Hicks, through counsel undersigned, pursuant to Rule 16.1 *et seq.* of the Arizona Rules of Criminal Procedure, moves this Court to suppress the introduction into evidence at trial of any items seized from apartment #10 located at 13024 North 22nd Street, on April 18, 1984. As grounds therefore, Defendant submits that the entry into apartment #10 and search thereof without a warrant or probable cause was improper and any evidence subsequently seized should be suppressed. This Motion will be supplemented by a Memorandum of Law to be supplied at a later date.

DATED this 24 day of July, 1984

By /s/ Robert E. Guzik
ROBERT E. GUZIK
817 North Second Street
Phoenix, Arizona 85004
(Attorney for Defendant)

[Certificate of service ommitted in printing.]

IN THE SUPERIOR COURT
OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF MARICOPA

[Title Omitted in Printing]

RESPONSE TO MOTION TO SUPRESS

The State of Arizona, by and through its attorney undersigned, responds pursuant to Rule 35.1 of the Arizona Rules of Criminal Procedure opposing Defendant's Motion To Suppress and requesting that this Court enter an Order summarily denying said Motion as it fails to set forth sufficient factual basis or legal grounds which could give rise to the suppression of any evidence to be presented at trial herein.

Respectfully submitted this 21st day of August, 1984.

ROBERT K. CORBIN
Attorney General

/s/ Steven A. LaMar
STEVEN A. LAMAR
Assistant Attorney General
Organized Crime and
Racketeering Division

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IN THE SUPERIOR COURT
OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF MARICOPA

[Title Omitted in Printing]

MEMORANDUM OF POINTS AND AUTHORITIES SUPPORTING PREVIOUSLY FILED MOTION TO SUPPRESS

MEMORANDUM OF POINTS AND AUTHORITIES

Facts:

On April 18, 1984 at 1450 hours, Officer Nelson responded to 13024 North 22nd Street reference a gun shot that had come through the floor from an upstairs apartment number 10, striking an occupant of downstairs apartment number 4 in the thigh. Officer Nelson entered the apartment number 10 after he received no answer at the door, to check to see if anyone was injured and to look for suspects.

Officer Nelson discovered two (2) weapons in the northeast bedroom of apartment number 10 and Officer Bonds discovered a handgun on the floor in the living room and there were no occupants in the apartment. While there, without a warrant, Officer Nelson seized several items of property and wrote down serial numbers and descriptions of various items including a stereo turntable that was located in the living room. Officer Nelson later ran the serial number of the turntable and found it had been listed as stolen in a robbery which is the subject matter of this criminal cause. A search warrant for apartment number 10 was then obtained with the probable cause being based on the original illegal warrantless search. A search was conducted approximately nine (9) hours later and several items of property were seized.

Law:

Officers Nelson and Bonds' *warrantless* search of apartment

number 10 was *per se* unreasonable and any fruits thereof, including items seized pursuant to a subsequent warrant supported by information received during the illegal search must be suppressed. *Wong Sun v. United States*, 371 U.S. 471, 83 S.Ct. 407 (1963).

As the United States Supreme Court states in *Katz v. United States*, 389 U.S. 347 at page 357:

> Searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment . . . subject only to a few specifically established and well-delineated exceptions.

In the case at bar, there are no exceptions to the warrant requirement and all property and evidence seized must be suppressed.

RESPECTFULLY SUBMITTED this 1 day of October, 1984.

By /s/ Robert E. Guzik
ROBERT E. GUZIK
817 North Second Street
Phoenix, Arizona 85004
Attorney for Defendant

[Certificate of Service Omitted in Printing]

IN THE SUPERIOR COURT
OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF MARICOPA

[Title Omitted in Printing]

RESPONSE TO MOTION TO SUPRESS

The State of Arizona, by and through its attorney undersigned, responds opposing Defendant, James T. Hicks', Motion to Suppress.

The State's position is set forth in the following Memorandum of Points and Authorities.

Respectfully submitted this 15th day of October, 1984.

ROBERT K. CORBIN
Attorney General

s Steven A. LaMar
STEVEN A. LAMAR
Assistant Attorney General
Organized Crime and
Racketeering Division

MEMORANDUM OF POINTS AND AUTHORITIES

FACTS:

On March 29, 1984, Ronald Jandrlich (age 17) was awakened from a sound sleep at approximately 1:10 a.m. in the bedroom of his home located at 3129 West Becker Lane where he lived with his mother, Joy Jandrlich.

Ron's first observation was that a gun was pointed in his face. He was then threatened, blindfolded, tied, beaten, and his mother's home was ransacked and personal property taken by three male suspects.

The incident was reported to Phoenix Police and an investigation was undertaken. This incident is the basis for the instant case.

On April 18, 1984, officers of the Phoenix Police Department, including Officer Steven Nelson, responded to an emergency shooting call at 13024 North 22nd Street, Phoenix, Arizona.

Upon arrival, officers located the victim in apartment number 4 of that address. The victim had just been wounded in the leg from a gunshot which had pierced the floor of apartment number 10 and corresponding ceiling of apartment number 4.

Faced with these exigent circumstances, the officers contacted the apartment manager and gained entry into apartment 10.

Upon entry Officer Nelson inspected apartment 10 for suspects, weapons, and other possible victims of the shooting.

During this inspection, weapons, ammunition, drugs, drug paraphenalia, masks, and stereo equipment were observed in plain view in apartment 10.

Officer Nelson wrote down serial numbers from several items of stereo equipment observed and made a routine telephonic stolen property check with NCIC while at apartment 10. Officer Nelson got a "hit" on a Bang and Olufsen turntable,[1] the *only* stereo equipment seized prior to issuance of a search warrant. The turntable had been stolen from the Jandrlich's home on March 29, 1984.

Based on evidence observed in apartment 10 and information gathered under DR #84-032756 relating to the instant case, a

---

[1]NCIC reported that the turntable had been stolen.

search warrant was issued and executed on apartment 10. The property listed in Exhibit (A), attached, was seized as a result of that warrant.

Among items seized pursuant to the warrant were several items of property taken from the Jandrlich apartment.

A lease, cleaning deposit documents, and items of identification seized from the apartment, coupled with observations of the apartment building management established that James Hicks, Wayne Graham, Tracy Turnquist, and Terry McCutcheon (all known members or associates of the Aryan Brotherhood) resided at or frequented apartment 10 prior to the shooting and during the time of the Jandrlich robbery.

This information led to the arrest of Wayne Graham and James Hicks.

LAW AND ANALYSIS:

In *State of Arizona vs. James Clifford Fisher*, Supreme Court No. 5611, filed June 14, 1984, the Arizona Supreme Court compared and distinguished the emergency aid doctrine allowing police officers to enter a dwelling without probable cause or a warrant and the exigent circumstance exception exception to obtaining a warrant prior to entering a dwelling with probable cause. The Court held the following with regard to the exigent circumstance exception to obtaining a warrant prior to entry of a dwelling:

> "The exigent circumstances exception is triggered when the police, with probable cause but no warrant, enter a dwelling in the reasonable belief that the delay necessary to obtain a warrant threatens the destruction of evidence. Schmerber v. California, 384 U.S. 757, 86 S.Ct. 1826, 16 L.Ed.2d 908 (1966); United States v. Rubin, 474 F.2d 262, *cert. denied sub nom.* Agran v. United States, 414 U.S. 833, 94 S.Ct. 173, 38 L.Ed.2d 68 (1973); State v. Lloyd, *supra*, or when they have a reasonable belief that a crime is in progress or has just been committed in a dwelling and the delay attendant to obtaining a warrant endangers the safety of life of a person therein. See State v. Sapp, *supra* (exigent circumstances justified entry where it was

> prompted by phone call from a woman informing police that her son was chasing her with a knife); People v. Hill, 12 Cal.2d 731, 755, 528 P.2d 1, 20, 117 Cal. Rptr. 393, 412 (1974) *overruled in part on other grounds* in People v. DeVaughn, 18 Cal.3d 889, 558 P.2d 872, 135 Cal.Rptr. 786 (1977) (exigent circumstances justified entry where police reasonably believed the shooting that had recently occurred and seriously wounded one person might have resulted in other casualties; 'the delay incidental to obtaining a search warrant could have resulted in the unnecessary loss of life.'); *see also* Johnson v. State, *supra*. The exigencies of the circumstances justify the failure to obtain the warrant that could have been obtained."

Here, Officer Nelson and other Phoenix Police Officers were justified in entering apartment 10 in light of the fact that they had reasonable grounds to believe that a shooting had just taken place, and, in fact the bullet wounding victim had come from apartment number 10, just moments before their arrival.

Once in apartment number 10, Officer Nelson had the right to seize property which an NCIC check identified as stolen found in plain view while searching for weapons and suspects in apartment number 10. See State v. Fisher, *supra* where the Arizona Supreme Court holds:

> "The fact that the search warrant was based on what they (officers) saw in plain view during the initial entry and survey does not render the search or seizure invalid. Because they were lawfully in the apartment, anything in plain view was subject to immediate seizure or use as grounds for a search warrant. *See* Coolidge v. New Hampshire, 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed 2d 564 (1971); State v. Mata, 125 Ariz. 233, 609 P.2d 48, *cert. denied*, 449 U.S. 938, 101 S.Ct. 338, 66 L.Ed.2d 161 (1980)."

The evidence establishing a recent shooting in apartment number 10, the evidence seized as a result of plain view observations by officers after their entry into apartment 10, and the information provided through a review of Departmental Reports

pertaining to the instant case, clearly established probable cause for issuance of the warrant executed in this case.

The United States Supreme Court in *United States v. Leon, et al*, No. 82-1771, argued January 17, 1984, decided July 7, 1984, establishes a good faith exception to exclusion of evidence seized pursuant to a search warrant issued by a detached and neutral magistrate but ultimately found to be invalid.

In *Leon* the affidavit which was presented in support of the issuance of the search warrant was found to be insufficient to establish probable cause because the information included therein was fatally stale and the affidavit failed to establish the informant's credibility. However, the exclusionary rule was not applied. In so holding the Court stated:

> "We have now re-examined the purposes of the exclusionary rule and the propriety of its application in cases where officers have relied on a subsequently invalidated search warrant. Our conclusion is that the rule's purposes will only rarely be served by applying it in such circumstances.
>
> "In the absence of an allegation that the magistrate abandoned his detached and neutral role, suppression is appropriate only if the officers were dishonest or reckless in preparing their affidavit or could not have harbored an objectively reasonable belief in the existence of probable cause."

CONCLUSION:

Based on all the above, Defendant's Motion to Suppress should be denied for the reason that Officer Nelson and other Phoenix Police Officers lawfully entered apartment number 10 based on exigent circumstances surrounding a recent shooting in that dwelling. Having lawfully entered apartment number 10, officers had a right and duty to make a search of that dwelling consistent with the need to locate weapons, suspects and other possible victims of the shooting. Officer Nelson had a right to check NCIC on a routine stolen property check of objects observed in plain view in the apartment. Officer Nelson lawfully seized stolen property found in plain view in the apartment.

There was probable cause to support the issuance of the search warrant. The warrant was properly executed and the evidence seized as a result of that warrant should not be suppressed.

Moreover, the United States Supreme Court decision in *United States v. Leon, supra,* requires that this Court not suppress evidence seized as a result of a search warrant issued in a good faith reliance on probable cause even if said warrant was later found defective. There is no evidence or allegation that Officer Nelson or any Phoenix Police Officer was reckless or untruthful in the preparation of the affidavit for search warrant, nor is there evidence that the magistrate abandoned his detached and neutral role in issuing the search warrant.

Therefore, based on all the above the State requests this Court enter an Order denying Defendant's Motion to Suppress.

Respectfully submitted this 15th day of October, 1984.

ROBERT K. CORBIN
Attorney General

/s/ Steven A. LaMar
STEVEN A. LAMAR
Assistant Attorney General
Organized Crime and
Racketeering Division

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IN THE SUPERIOR COURT
OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF MARICOPA

[Title Omitted in Printing]

REPORTER'S TRANSCRIPT OF SUPPRESSION HEARING
NOVEMBER 7, 1984

THE COURT: State of Arizona vs. James Thomas Hicks. CR-140258.

MR. LaMAR: State is ready. Steve LaMar appearing.

MR. GUZIK: Ready, Your Honor. Robert Guzik appearing on behalf of the defendant.

Your Honor, I believe we do have a couple of matters we can stipulate to as far as this hearing is concerned. One, I believe the State and the defendant can stipulate to the fact that the original entry by police officers into Apartment No. 10 referred to in the Motion to Suppress was without a warrant. Secondly, I believe there can be a stipulation that Mr. Hicks name was on a lease agreement for that particular apartment No. 10 at that same location.

THE COURT: Are you stipulating that he was in fact the tenant in that

MR. GUZIK: We are stipulating his name is on the lease, Your Honor, and as such, as the person responsible and that there were belongings of his in the apartment. [R.T. 4][1] That he does have a standing for this Motion to Suppress.

THE COURT: Mr. LaMar?

MR. LaMAR: Well, Your Honor, I can only say that the State's evidence would be, Mr. Hicks name in fact was on the lease as being responsible for payment of the lease and utilities. Further, that the manager of the apartment, Mr. Ghigo (phonetic), I believe I pronounced it correctly, would testify to the fact

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1. References to Reporter's Transcript are noted as "R.T." and page number.

that James Hicks was the person who entered into that agreement prior to April 18, 1983.

THE COURT: April 18, '83?

MR. LaMAR: Yes. I believe that is the date of the execution of the warrant. '84, excuse me.

THE COURT: '84. All right. So that you do stipulate to on the part of the defendant?

MR. LaMAR: Yeah.

THE COURT: Since there has been a stipulation about the original entry without warrant, I assume at this point the State should proceed.

MR. GUZIK: Thank you, Your Honor.

MR. LaMAR: State would call Mr. Nelson.

MR. GUZIK: I would invoke the Rule, Your Honor.

THE COURT: Anyone here in the courtroom who is going to testify in this matter?

MR. LaMAR: No, Your Honor.

THE COURT: All right. [R.T. 5]

STEVEN C. NELSON, called as a witness herein, having first been duly sworn was examined and testified as follows:

THE COURT: Mr. LaMar?

MR. LaMAR: Thank you.

DIRECT EXAMINATION

BY MR. LaMAR:

Q State your full name, please.

A Steven C. Nelson.

Q Where are you employed?

A Phoenix Police Department.

Q On April 18, 1984, were you employed in that capacity?

A Yes, I was.

Q Did you have an occasion on that date to come to an apartment complex at 13024 North 22nd Street in Phoenix, Arizona?

A Yes, I did.

Q Is that in Maricopa County?

A Yes, it is.

Q What caused you to be called to that scene?

A As a result of a radio call where a subject had been shot. [R.T. 6]

Q And at some point in time was your attention directed to Apartment No. 10?

A Yes, it was.

Q Can you describe this apartment complex for the Judge?

A Okay. It's a two-story building. As I recall I think there is five apartments on the bottom and five or six, five or six on the bottom, five or six on top. I can't remember the exact number. That faces south only. It just runs east and west direction.

Q And the apartments are on top of each other?

A Yes.

Q Were you able to determine after you arrived at the apartment complex, where the victim of the shooting was?

A It was I can't remember which apartment number. It was the apartment directly below number 10.

Q Were you able to determine or were officers able to determine where the shot had come from?

A Yes. From that Apartment No. 10, from the bullet hole that was in the ceiling.

Q All right. There was a bullet hole in the ceiling of the apartment where the victim resided?

A Yes.

Q I assume the corresponding bullet hole in [R.T. 7] Apartment No. 10?

A Yes. But because of the carpet, I don't think we were able to find exactly where the hole started.

Q Did you have some information or did officers have information which led you to believe there was a suspect in Apartment No. 10 with respect to the shooting?

A Yes. I was informed by the other officers there that one of the neighbors, I think, was in the apartment at the east end of the apartment complex, who said that, or that the subject that had been residing in that apartment had run out on the balcony, looked over the balcony, then run back into the apartment after the wife of the victim downstairs had run outside screaming, running to another neighbor's house to use the telephone.

Q How many officers were there at the scene when you

arrived?

A As I recall, about six.

Q How many minutes after the shooting would you say it was you arrived, as best you can guess?

A Fifteen minutes, something like that.

Q The time elapse would account for the victim's wife running to the phone, calling the police, radio dispatch and your arrival?

A Yes. Because the other officers had arrived before me, including the Fire Department to treat the victim. [R.T. 8]

Q All right. Did at some point in time you or other officers gain entry into Apartment No. 10?

A Yes.

Q And were you first to go in or did some other officers go in before you?

A Other officers went in first.

Q Do you recall off-hand who was there?

A I believe there was Officer Bonds, Officer Hubner, there was Sergeant West, Sergeant Chapman, and Officer Johnson. As I recall, those are the only ones.

Q You recall how they made entry?

A The manager or the owner of the apartment complex had shown — had come to the scene and unlocked the door with a key.

Q Did you go into the apartment?

A Yes, I did.

Q And did you look around the apartment?

A Yes, I did.

Q What were you looking for, sir?

A Originally we were looking for a weapon on that — well, originally went in to look for the suspect, you know, who had fired the shot. We determined that the suspect was not there and began looking around for a weapon.

Q Were weapons found?

A Yes. [R.T. 9]

Q Can you describe the weapons that were found, who found them and where they were found?

A Okay. Officer Bonds found the first weapon which was a

.25 automatic in the living room area next to the couch which would be towards the east wall, almost directly above where the victim had been shot.

Q Were you — okay. Go ahead.

A Okay. After the — let's see. Also shortly after he found that gun there he found a stocking cap that had a hole cut out of it like to make — like a mask and everything and aroused a little more suspicion and began to search the apartment a little bit further. I was able to find a .45 automatic and a sawed-off 22[1] rifle with a bandana clip on it, about a 30-round clip as I recall.

Q The sawed-off 22 rifle with the bandana clip and the .45 automatic, where were they found?

A They were found under the bed mattress in the northeast bedroom.

Q Did you search or look in other areas where you thought a weapon could reasonably be concealed?

A Yes, I did.

Q What other sorts of areas did you look in the apartment for weapons?

A Looked around in the closet, under the bed. As I recall there were some dressers there. Looked in those [R.T. 10] items, places there, but I think those were the only two that I found.

Q While you were in the apartment did you happen to see stereo equipment?

A Yes, I did.

Q What was the first piece of stereo equipment that drew your attention?

A Well, as soon as I entered in the living room area I noticed that there was a stereo set up along the east wall. But it was after I had been to the bedroom and found the guns that I decided to — I was going to check the serial number on the guns. So then I said, well, as long as I am checking serial numbers, I may as well check the serial numbers on the stereo items too. There was a stereo set in the living room area and also another stereo set in the northeast bedroom.

Q Was there a Bang and Olufsen turntable in the living room?

A In the living room, correct.

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[1]Officers located a .22 caliber rifle. The original Reporter's transcript erroneously states a "22" rifle throughout. Petitioner will not repeatedly note this error.

Q Could you describe to the Court where it was and where it was placed on?

A It was a concrete block and board set-up along the east wall in the living room. You know, just kind of a makeshift furniture item. They were set up on there with the speakers at either ends and the stereo components in the center of it. [R.T. 11]

Q Did you get the serial number off of that piece of equipment?

A Yes, I did.

Q Did you check serial numbers on other equipment there in the apartment?

A Yes. I also got the serial numbers on the speakers and the stereo components in the living room and of the stereo components in the northeast bedroom.

Q Then you checked the serial numbers on the weapons and the stereo equipment?

A Yes.

Q How did you do that?

A There is a telephone in the apartment on the kitchen table there and I called our Identification Bureau. One of the clerks down there checked the serial numbers in the computer.

Q All right. Now, did you seize any stereo equipment other than the Bang and Olufsen turntable?

A No, I didn't. When I called down she told me that there was a — what is called a "hit", an NCIC on the stereo Bang and Olufsen component. That was the only one reported stolen. So I took the guns for safekeeping and I took the stereo because it was reported stolen. I left everything else there. [R.T. 12]

Q How do things get into that NCIC check? Do you know?

A They are entered in by someone in our general investigations bureau.

Q But as a police officer, you know that if NCIC comes back with "hit", that someone, either a police officer or some clerk at the Police Department is relying on information gathered by the police that has indicated that is property that was stolen in some manner or fashion.

A That's correct.

Q You had that understanding when you received that

information on the phone?

A Absolutely.

THE COURT: What does NCIC stand for?

THE WITNESS: National Crime Information Center. It's the computer that is controlled by the FBI.

THE COURT: Thank you. So it's national. It's not a local or is it local?

THE WITNESS: Well, it's available to all police agencies throughout the United States. So we also have an ACIC, Arizona Crime Information Center which is a separate computer system.

BY MR. LaMAR:

Q That logs stolen property reports?

A Yes. Uh-huh. [R.T. 13]

Q That is routinely used by the Police Department for checking on property?

A That's correct.

Q Does that akin to a license plate check on a vehicle when you stop a driver for let's say some traffic violation?

A Yes. It's pretty general to check a lot of those things through the computer now.

Q Then the computer comes back —

MR. GUZIK: Object to relevancy, Your Honor.

THE COURT: I think he is just trying to explain to the Court so I get the concept. But I do understand the concept.

BY MR. LaMAR:

Q What items did you seize other than the turntable that was reported stolen?

A As I recall, just the three guns, the .45 automatic pistol, the sawed-off 22 rifle and the .25 automatic pistol.

Q And you made some checks while you were at the apartment and before you seized any items of evidence; is that correct?

A Yes. The check on the computer.

Q Yes.

A Yes. [R.T. 14]

Q So any statement that you seized items and went to the police station, then made checks on whether they were stolen is

incorrect?

A That's correct.

Q Okay. What did you do after you left the apartment and seized the items?

A Again, then I went to the Union Hills substation. There I tried to find — I in fact — I was under the impression that the stereo was taken in a burglary. So I checked our detectives' files for burglary reports and I couldn't find that report number. So I called back down to our Identification Bureau and had her get a copy of that report. That is when I learned that it was an armed robbery report rather than a burglary report. She read the report to me, you know, the items that were taken. At that particular time I noted that along with that Bang and Olufsen turntable, the other serial items that I had written down with the serial numbers in the apartment were also listed on that report. But for some reason they didn't come up on the computer. I never did learn why.

Q But other items of stereo equipment which were in the apartment were listed in the report?

A Yes. Even with the seria! numbers.

Q Did you speak with Officer Russler, Sam Russler of the Phoenix Police Department that day or thereafter? [R.T. 15]

A Yes, I did.

Q Did you tell him of your findings at the Apartment No. 10?

A Yes, I did.

Q Do you know whether or not he completed an affidavit for execution of a search warrant on that apartment?

A Yes, he did.

Q Do you know whether or not he reviewed the police department report regarding the armed robbery that you have just referred to?

A I don't recall any independent knowledge of it, so —

Q All right. Officer, when you were looking, searching the apartment, did you have to move the Bank [SIC] and Olufsen turntable in order to see what the serial number was on that piece of stereo equipment?

A As I recall, I had to turn it around or turn it upside down.

I can't remember which.

Q How much space was there between the wall and the back of the turntable?

A Approximately a foot.

MR. LaMAR: I have no other questions at this time.

THE COURT: Mr. Guzik?

MR. GUZIK: Thank you, Your Honor. [R.T. 16]

CROSS-EXAMINATION

BY MR. GUZIK:

Q Officer Nelson, when you arrived at the scene at 13024 North 22nd Street, I believe you had stated earlier to me that the other officers were there and had the place basically surrounded; is that correct?

A That's correct.

Q And you came upon the scene and you were given instructions by your Sergeant; is that correct?

A That's correct.

Q And what were his instructions to you?

A Well, he was in the alley when I arrived and I drove into the alley which would have been on the west side of the apartment building. At that time he told me they had not been in the apartment and pointed to a window that was open on the upstairs level and said, instructed me to stay there and watch that nobody tried to get out that window.

Q And he had indicated to you that no one had been in the apartment yet; is that correct?

A That's correct.

Q And so you stayed back in the alley watching the upstairs window which turned out to be Apartment No. 10 window; is that correct?

A That's correct.

Q How long would you say you stayed there? [R.T. 17]

A Ten minutes, 15 minutes, something like that.

Q What happened at the expiration of that period of time?

A I was in — you know, finally one of the officers, I think, as I recall, from that open window, Apartment 10, called to me and said it was okay or else it was over the radio. I don't recall which

way.

Q And what did you do at that point?

A I walked around to the front and went up to Apartment No. 10.

Q Were there people already in the apartment at that time?

A Yes, there were.

Q And I believe you indicated to me that they had told you the place was secure when you got there; is that correct?

A Told me that the suspect wasn't there and which makes it secure enough that there is no danger to anyone.

Q So they had already gone through the apartment to see whether there was anybody in need of aid or a person or a suspect; is that correct, at the time you got there?

A That's correct.

Q And you walked — you then went into Apartment No. 10 and I believe you indicated that Officer Bolton —

A Bonds. [R.T. 18]

Q Bonds was there and he had — he had recovered a weapon; is that correct?

A Yes.

Q That was the .25 caliber?

A That's correct.

Q Did somebody then tell you that you should start searching the apartment?

A No. I don't recall anybody telling me to search it.

Q And what was the purpose at that point to begin a search of the apartment?

A Just a check for any other weapons that might be around. We did locate another possible hiding spot. There was one closet which had a crawl space into the attic and we, you know, we tried to get up into it. But we couldn't. It was really difficult. Finally, determined, we finally did get up there. We pretty well determined the suspect did not go up in there.

Q So your purpose then was to be — even being there was to search for weapons or suspects; is that correct.

A That's correct.

Q Now, your search for weapons, I believe you testified on direct examination, included looking through dresser drawers; is

that correct? [R.T. 19]

A That's correct.

Q And I believe that you had indicated that you found a couple of weapons under a bed mattress; is that correct?

A That's correct.

Q Between the box springs and the bed mattress?

A That's correct.

Q Are they in your view at all or did you have to lift the mattress up to observe them?

A I had to lift the mattress up to observe them.

Q And I believe a police report indicated there were some items found in a refrigerator also; is that correct?

A They were, yes.

Q Were you part of that?

A No, I didn't have anything to do with finding that.

Q Would you say then that you generally searched the entire apartment?

A Between the officers that were there, yes.

Q And yourself?

A Yes.

Q And in the living -- how long would you say you were there at the scene from the time you got into the apartment until the time you left the apartment?

A Maybe an hour. I really can't recall for sure.

Q And during that period of time you were conducting [R.T.20] a search; is that correct?

A It was pretty well completed within — probably within 15, 20 minutes of the time we were in there.

Q What kind of — how big was the apartment?

A Two bedrooms, living room, kitchen that was kind of connected, and then two bedrooms behind it.

Q So it was basically a three or four-room place; is that correct?

A That's correct.

Q Relatively small?

A Yes, relatively small.

Q What was it about the Bang and Olufsen turntable that made you pick it up or lift it to take the serial numbers off?

A Because it was an item of value. In over 12 years of police experience I know those things are stolen a lot and I just decided to check the serial numbers.

Q So you just were curious, is that it?

A Well, I was suspicious, you know. We found this cap that looked like a mask. You know, the guns, the sawed-off gun was illegal. I remember the name from one of the subjects that had lived there from some prior past police work. It just — I was just suspicious.

Q Was there anything about that Bang and Olufsen receiver that would have led you to believe or have a [R.T. 21] reasonable belief that it was stolen?

A Not until I had the serial number verifying that it was stolen.

Q And what about the other equipment that you lifted or turned to get the serial numbers on? Was there any reason to believe any of this equipment was stolen?

A No, just merely — I was really suspicious, you know. They were nice equipment but, you know

Q So the fact is that you were just seeing what you could find there; is that correct, in the apartment, and check any serial numbers that you could to see if you could locate any stolen property; is that correct?

A That's correct.

Q Now, the information that you received, you got a "hit" on the Bang and Olufsen turntable; is that correct?

A That's correct.

Q Which would indicate, as you described before, that the property had been stolen?

A Yes, sir.

Q And does that "hit" also give you a police report number that you can check? Do you know?

A Yes. As I recall, she gave me the report number at that time. But I didn't ask to see anything more than that. We were kind of hurrying, you know, to get out of there.

Q So you left the apartment and you went back to [R.T. 22] the Union Hills station and you took with you the Bang and Olufsen stereo turntable and three weapons that you previously described; is that correct?

A That's correct.

Q And when you got to the Union Hills station, you took

the information you received from NCIC, that information being as a result of taking down serial numbers from a stereo, calling it in, calling NCIC, getting a DR number. You were able to locate a DR number; is that correct?

A That's correct.

Q From that DR number or police report number, you were able to give information to Officer R:ssler; is that correct?

A Yes.

Q All of that was based on the stereo turntable unit that you got the "hit" on in the beginning; is that correct?

A Yes, sir.

Q And based on that information that you gave him, he obtained a search warrant for the apartment; is that correct?

A I believe that's correct.

Q Did you participate in the execution of the search warrant at the apartment?

A No, I went home.

Q You went home? [R.T. 23]

A Uh-huh.

Q You were through for the night?

A I was through for the night.

Q That search warrant was executed, to the best of your knowledge, approximately nine hours after the original entry by yourself; is that correct?

A I can't remember the exact time.

Q When you were looking, lifting and turning and looking at the piece of equipment that were there at the apartment, where did you write the serial numbers of those pieces of equipment down?

A On a — what we call a Form 36 card. I have one in my pocket if you would like to see it.

Q Sure. Could I take a look at it?

A It's just a general information card. Just wrote my notes down on that.

Q And after you wrote the serial numbers down, you took this card, I take it, and called in all of the telephone numbers or the serial numbers; is that correct?

A That's correct.

Q Did you or any of the other officers, to your knowledge, have any reason to believe that there was anybody injured in Apartment No. 10 that evening?

A Well, we just didn't know. Nobody answered the door. Don't know the reason why the gun went off. You [R.T. 24] know, we were just trying to figure out if anybody else was hurt, you know. You know, we didn't really know.

Q So would you say it was a welfare check, the reason you were there was for a welfare check or what?

MR. LaMAR: I object, Your Honor. First, it misstates previous testimony and second, calls for a legal conclusion.

THE COURT: What is the question he is asking him? Whether or not one of the reasons for the search was a check to determine if anybody was injured; is that correct?

MR. LaMAR: No, I believe the question was, is it fair to say that the reason for the search was a welfare check? I believe that misstates previous testimony and second, it calls for a legal conlusion.

THE COURT: Well, okay, can you read the question back?

(The pending question was read back by the Court Reporter.)

THE COURT: Mr. Guzik, if you can rephrase that so it doesn't appear — the question isn't, is that the only reason. If you want to know if that was one of the reasons —

MR. GUZIK: Oh, I think he has already covered why they were there, Your Honor.

THE COURT: Well, I don't know. I think you have [R.T. 25] indicated you didn't know whether anyone was injured or not. Isn't that what you indicated?

THE WITNESS: Yes, we didn't know whether anyone was injured inside Apartment 10 or not.

THE COURT: Is that one of the reasons you were there, to determine whether or not anyone was injured?

THE WITNESS: It was, you know, part of the reason to go in but mainly, because we had been told that someone had run out and run back in. So we knew somebody was there and apparently hiding because they wouldn't answer the door. So

something was suspicious. That of itself, that was the main thing. We didn't know if that person had shot somebody else in there or what, so—

THE COURT: Okay.

BY MR. GUZIK:

Q And I believe you have already answered the question that it wasn't immediately apparent to you that anything was stolen in that apartment; is that correct? You already answered that?

A I believe that's correct. I was just suspicious.

MR. GUZIK: I don't have any further questions.

THE COURT: Any redirect?

MR. LaMAR: Just a very few, Your Honor. [R.T. 26]

//

REDIRECT EXAMINATION

BY MR. LaMAR:

Q Officer Nelson, now, Officer Russler was also aware prior to execution or prior to the preparation of the affidavit for search warrant, that in fact you had found three weapons in that apartment; isn't that correct?

A That's correct.

Q And the mask?

A That's correct.

Q And that a shot had been fired earlier that day?

A That's correct.

Q That in fact, someone had been wounded by that shot in the apartment below?

A That's correct.

Q You also knew what the manager had stated with regard to the occupancy of the apartment; isn't that correct?

A That's correct.

MR. GUZIK: Your Honor, Officer Russler is here if Mr. LaMar intends to call him. I will object to this as being hearsay.

BY MR. LaMAR:

Q You told Officer Russler, did you not, about the circumstances surrounding the shooting, the victim, the circumstances

surrounding the Bang and Olufsen turntable and the weapons you seized from that apartment, did you not? [R.T. 27]

A Yes, I did.

Q Now, you stated that although you were there for an hour, the actual search of the apartment for weapons and suspects lasted 15 to 20 minutes.

A That is roughly — I can't — I wasn't paying much attention to the time, so I am guessing at the time.

Q Counsel asked you on cross-examination whether you would say generally that the whole apartment was searched. Let me ask you a little different question. In your opinion was the apartment thouroughly searched or was it superficially searched for weapons?

A I think it was mostly superficially searched for the weapons so—

THE COURT: What were you doing the balance of the time, 45 minutes?

THE WITNESS: Well, trying to determine, you know, if anybody was going to come back. We were told that — the manager said that the renter should have been running home at any time. In fact, while I was sitting there thinking, I think we were in there longer than an hour. I can't remember the exact amount of time. I remember getting there as the sun was still up and leaving after sunset, as I recall. I can't remember my exact time that I was there.

BY MR. LaMAR:

Q While you were there did the manager come and [R.T. 28] change the lock on the door and state that the occupants of that apartment were evicted immediately?

A Yes, he did.

THE COURT: Did he state that to the officer or did he state that to one of the occupants in the apartment?

THE WITNESS: The occupants did not show up while we were there.

THE COURT: Just sort of made a general statement to those persons present?

THE WITNESS: Yeah, since I was the officer that had been designated to write any report at that particular time. But

they were busy changing the locks and he left a note on the door that they were evicted. If they wanted to get in to contact him immediately.

MR. LaMAR: I have no further questions.

THE COURT: Mr. Guzik?

RECROSS-EXAMINATION

BY MR. GUZIK:

Q Just in general, Mr. LaMar asked a question about a superficial search for weapons. Were you searching in the refrigerator for weapons?

A I didn't search the kitchen at all. So I don't know the purpose of the officers.

Q But there was somebody searching the refrigerator [R.T. 29] for weapons; is that correct?

A It's big enough to hold a weapon.

Q And they were searching, superficially searching under the bed and in between the mattresses for weapons; is that correct?

A Well, maybe they weren't superficial. I may not be using a good word. But I searched anywhere where a weapon could be hidden.

MR. GUZIK: I don't have anything further.

THE COURT: What is the officer's name? I had written down Russell, then something else. What is his name?

THE WITNESS: There is an Officer Bonds that originally found the .25 automatic in the living room.

MR. GUZIK: Russler.

THE WITNESS: Oh, Russler.

THE COURT: The one who filled out the affidavit for the search warrant.

THE WITNESS: Yes, Russler.

THE COURT: R-u-s-t-l-e-r?

THE WITNESS: I think it's s-s-l-e-r.

THE COURT: Okay. Thank you.

All right. You said you were suspicious when you started looking at serial numbers. You were suspicious because of the fact that one of the officers found the gun or found three guns ultimately and the stocking with the [R.T. 30] holes in it. That is all your suspicion was based on?

THE WITNESS: No, also based on 12 year's worth of

police experience. I have worked in different burglary crimes throughout that period of time and, you know, I'm just very familiar with people converting stolen stereos and TVs into their own use. Just the appearance of the apartment.

THE COURT: What about the appearance of the apartment?

THE WITNESS: Well, it was rather sloppily kept. It was just a lot of junk, a lot of cases of alcohol around. We did find some drug paraphernalia items around. These things were just built into my suspicion.

THE COURT: All right. You think the stereo was an expensive stereo? I don't know this brand so — everybody seems to. Bang and something?

THE WITNESS: Olufsen. I wasn't that familiar with it but it looked like it was good stereo equipment. So it appeared expensive to me.

THE COURT: Did it appear to be out of place in that apartment?

THE WITNESS: Yes, it did.

THE COURT: I don't know what the rental amount was in that apartment. Do you have any idea what they get for rent? [R.T. 31]

THE WITNESS: I really don't.

THE COURT: It wasn't one of the high rent areas?

THE WITNESS: No, definitely not.

THE COURT: The equipment looked like it could be more expensive than the people that could afford that equipment?

THE WITNESS: Normally, yes. That is what was odd to me.

THE COURT: Okay. Thank you. Anything else? Have I raised any other issues?

FURTHER REDIRECT EXAMINATION

BY MR. LaMAR:

Q What specific information did you have regarding one of the gentlemen who lived there? You said that you recalled the mention of one of the occupant's names.

A The McCutcheon person was supposed to be living with the two tenants of the apartment according to the manager. He

was the guy that was described by the neighbor as the guy who ran out over the balcony. At the mention of his name I remembered hearing his name at the police station around other officers.

Q But you do not recall in what context?

A It was in some crime investigation, but I couldn't remember exactly what it was about. But the name [R.T. 32] did ring a bell.

MR. LaMAR: Thank you.

THE COURT: Anything else?

MR. GUZIK: Nothing else.

THE COURT: Officer Nelson, the Rule has been invoked which means you can't discuss your testimony until this matter is over. Don't discuss what you have testified to and don't let anybody else tell you what he or she intends to testify to until the case is over with the exception of the attorneys.

THE WITNESS: Okay. Thank you.

THE COURT: Mr. LaMar?

MR. LaMAR: Call Officer Russler.

IN THE SUPERIOR COURT
OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF MARICOPA

[Title Omitted in Printing]

POST MOTION TO SUPRESS MEMORANDUM

COMES NOW, the Defendant, and sets forth his position based on the evidence presented at the Motion to Suppress hearing and the applicable law.

The State of Arizona contends at page 7 of its Response to Motion to Suppress that Phoenix Police Department Officers lawfully entered apartment number 10 based on exigent circumstances surrounding a recent shooting in that dwelling, and having lawfully entered had a right and duty to make a search of that dwelling consistent with the need to locate weapons, suspects and other possible victims of the shooting. The State, at page 7 of its Response, also contends that Officer Nelson had a right to check NCIC on a routine stolen property check of objects observed in plain view in the apartment.

The State's position is incorrect and all evidence seized at the initial illegal warrantless search of apartment number 10 and all evidence seized as a result of the subsequent search conducted with a search warrant based on information obtained during the illegal warrantless search must be suppressed.

It is now well established that under the "plain view" doctrine, police officers may seize evidence, instrumentalities or fruits of crime without the necessity of having first obtained a search warrant specifically naming such items. *Ker v. California*, (1963), 374 U.S. 23, 83 S.Ct. 1623, 10 L.Ed. 726.

In the course of analyzing the plain view doctrine in *Coolidge v. New Hampshire*, (1971), 403 U.S. 443, Mr. Justice Stewart stated the following at page 466, 91 S.Ct. 2022, at page 2038, 29 L.Ed.2d 564:

> What the 'plain view' cases have in common is that the police officer in each of them had a prior justification for an intrusion in the course of which he can inadvertently across a piece of evidence incriminating the accused. The doctrine serves to supplement the prior justification — whether it be a warrant for another object, hot pursuit, seach incident to lawful arrest, or some other legitimate reason for being present unconnected with a search directed against the accused — and permits the warrantless seizure. Of course, the extension of the original justification is legitimate only where it is immediately apparent to the police that they have evidence before them; the 'plain view' doctrine may not be used to extend a general exploratory search from one object to another until something incriminating at last emerges.

So in order to qualify under the plain view exception, it must be shown that (1) the initial intrusion which afforded the authorities the plain view was lawful; (2) the discovery of the evidence was inadvertent; and, (3) the incriminating nature of the evidence was immediately apparent.

Applying the three (3) *Coolidge* elements to the instant case, it is clear that all evidence seized must be suppressed. (1) If we assume that the initial warrantless intrusion by Officer Nelson and other members of the Phoenix Police Department was lawful, we must then move on the (2) whether the discovery of the evidence was inadvertent. It was abundantly clear from the testimony of Officer Nelson at the Motion to Suppress hearing that the discovery of the Bang and Olufson turntable and all other stereo and video equipment as being evidence was not inadvertent. Officer Nelson testified about how the Officers had been in apartment number 10 for over an hour and conducted a general exploratory search of the entire apartment when their only purpose was to check on the welfare of any occupants, to search for a suspect and to locate weapons. Officer Nelson testified that he had no knowledge that any of the equipment whose serial numbers he wrote down had been stolen and that he had to lift or turn all the equipment to find serial numbers for recordation. Officer Nelson then obtained NCIC information that the Bang

and Olufson turntable was stolen. It was quite clear that the discovery of all the items seized was not inadvertent from the testimony.

(3) The next question is whether or not the incriminatory nature of the evidence was immediately apparent. From the testimony of Officer Nelson, it was quite clear and he so testified that it was not immediately apparent to him that the stereo and video equipment had been stolen. There was nothing about any of the equipment that was out of the ordinary. There was nothing about these items that made it immediately apparent that anyone was in possession of property which Officer Nelson knew, or had probable cause to believe, was contraband. Attached are copies of *State v. William,* 377 N.E.2d 1013 and *State v. Keefe,* 537 P.2d 795, both dealing with the plain view exception and citing many examples of illegal searches under the State theory of plain view.

In a case that is on point with the case at bar, the United States Court of Appeals affirmed the suppression of evidence by the trial court in *United States v. Clark,* (C.A. 8, 1976), 531 F.2d 928. In that case, a semi-automatic pistol was suppressed. The seizure of the pistol occurred after Clark's motorcycle repair shop and attached residence had twice been search, first by state authorities and then by federal agents. The first search was conducted pursuant to a warrant issued for controlled substances. During this search the investigating officers discovered the pistol in Clark's possession and recorded the serial number of the firearm. The weapon was subsequently traced, revealing several possible violations of federal firearms statutes. A second warrant was then issued, particularly describing the semi-automatic pistol, and as a consequence of a second search the pistol was seized. In affirming the suppression of this evidence, the appellate court refused to apply the plain view doctrine. The court based its decision on the fact that the incriminating nature of the pistol was not immediately apparent at the time of the initial search, and that therefore, because of its exploratory nature, the first search was unreasonable and violative of the Fourth Amendment. Accord, *United States v. Gray,* (C.A. 6, 1973), 484 F.2d 352.

It is clear that all evidence seized in our case during the initial warrantless search and subsequent search with a warrant must be

suppressed as being fruit of the poisonous tree. *Wong Sun v. United States*, 371 U.S. 471, 83 S.Ct. 407 (1963), and its progeny.

The State then says that if the original warrantless search by Officer Nelson and the Phoenix Police Department was illegal, then it does not make any difference because the illegal information obtained during the illegal warrantless search by the Phoenix Police Department was then sanitized and used in an attempt to establish probable cause by the same Phoenix Police Department to obtain a search warrant for apartment number 10 to seize the items which Officer Nelson discovered during his general illegal exploratory search. The State cites *United States v. Leon*, No. 82-1771, argued January 17, 1984 and decided July 7, 1984 for that proposition. *United States v. Leon* does not apply to the facts of our case and in any event our United States Supreme Court has indicated that *Leon* would not be applied retroactively.

It is respectfully requested that the Court grant Defendant's Motion to Suppress the illegally obtain evidence in this case.

DATED this 8 day of November, 1984.

By /s/ ROBERT E. GUZIK
Robert E. Guzik
817 North Second Street
Phoenix, Arizona 85004
Attorney for Defendant

[Attachments to Motion and Certificate of Service Omitted in Printing]

IN THE SUPERIOR COURT
OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF MARICOPA

[Title Omitted in Printing]

MINUTE ENTRY ORDER

1:46 p.m. This is the time set for trial. John Todd is present for the State. Robert Guzik is present with and for the defendant. This is also the time set for hearing on Motion to Suppress.

Court Reporter: Lydia Estrada

Counsel present agruments to the Court.

It is Ordered granting defendant's Motion to Suppress. Items seized prior to the turntable are not being suppressed. Drug paraphenalia are not being suppressed.

Further Ordered continuing the trial set this day to *November 28, 1984 at 8:45 a.m.* in this division before Judge Stover. This is a non-firm trial date.

2:18 p.m. Hearing concludes.

IN THE SUPERIOR COURT
OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF MARICOPA

[Title Omitted in Printing]

REPORTER'S TRANSCRIPT OF PROCEEDINGS

November 20, 1984

THE COURT: Well, I am intending to suppress anything that came as a result of turning the turntable upside down or turning it around to get the serial number and calling in to this computer and getting information. Anything that flows from that should be suppressed. If they were able to tie Mr. Hicks into that robbery some other way other than [R.T. 15] what came out of this search, then of course I am not — or they inevitably would have discovered it some other way, I am not intending to suppress that. Anything that they got as a result of this, of just curiosity about the turntable and the fact that it — the officer did not immediately realize that it was a subject of a crime, then I think it was illegally looked at and seized.

MR. TODD: Just so I make sure I understand the Court's ruling, there were certain items which were seized prior in time to the turntable being looked at, the serial number? Those items you are not suppressing; is that correct?

THE COURT: As I recall, there were three guns. No, I'm not. Or the stocking that had holes in it. I'm not sure that was seized. But at least it was described.

MR. TODD: Those items are not being suppressed?

THE COURT: Right.

MR. TODD: After the point in time —

THE COURT: And drug paraphernalia or drugs that were observed. If they were looking for places where there were guns and then discovered those things, that would be valid also, they could seize those.

MR. TODD: Okay. Then the things that are suppressed are those items that were discovered after the "search" concerning the turntable?

THE COURT: Right. [R.T. 16]

OFFICE OF THE CLERK
SUPREME COURT OF THE UNITED STATES
WASHINGTON, D.C. 20543

April 7, 1986

Steven J. Twist, Esquire
Chief Counsel, Organized Crime and
Racketeering Division
Office of the Attorney General of Arizona
1275 West Washington
Phoenix, Arizona 85007

Re: **85-1027 — Arizona v. James Thomas Hicks**

Dear Mr. Twist:

The Court today entered the following order in the above case:

> "The motion of respondent for leave to proceed *in forma pauperis* is granted. The petition for a writ of certiorari is granted."

Enclosed are memorandums describing the time requirements and procedures under the Rules. Please note that extensions of time to file the joint appendix and briefs will not be favored.

I have been instructed to inform you that Rule 34.1(a) is satisfied by having the initial sheet in the brief state the "Questions Presented" without more. Counsel should not print on this page the title of the case or any other descriptive matter.

The additional docketing fee of $100.00 (Rule 45(a)) is now due and payable.

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PETITIONER'S

BRIEF

Supreme Court, U.S.
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No. 85-1027

In the Supreme Court of the United States

OCTOBER TERM, 1985

STATE OF ARIZONA, PETITIONER

v.

JAMES THOMAS HICKS, RESPONDENT

ON WRIT OF CERTIORARI TO THE
ARIZONA COURT OF APPEALS

BRIEF FOR PETITIONER

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QUESTION PRESENTED

UNDER THE PLAIN VIEW EXCEPTION TO THE FOURTH AMENDMENT, CAN POLICE LOOK AT AND RECORD IDENTIFICATION NUMBERS FROM EVIDENCE INADVERTENTLY FOUND IN THE COURSE OF CONDUCTING A LAWFUL SEARCH WHERE POLICE CAN POINT TO PARTICULARIZED, ARTICULABLE FACTS AND REASONABLE INFERENCES DRAWN THEREFROM WHICH LEAD THEM TO BELIEVE THAT THE EVIDENCE IS INCRIMINATING?

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ON WRIT OF CERTIORARI TO THE
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BRIEF FOR PETITIONER

OPINION BELOW

The Arizona Court of Appeals' opinion holding that the recording of serial numbers from a suspicious stereo unit, unrelated to the exigency justifying entry, involved an additional unlawful search, not necessitated by the exigency, is reported in *State v. Hicks*, 146 Ariz. 533, 707 P.2d 331 (Ct. App. 1985).

STATEMENT OF JURISDICTION

The State of Arizona appealed the November 20, 1984, superior court order suppressing all evidence except drug paraphernalia to the Arizona Court of Appeals pursuant to Arizona Revised Statutes Annotated § 13-4032(7). The Arizona Court of Appeals had jurisdiction to hear the appeal pursuant to Arizona Revised Statutes Annotated §§ 12-120.21(A) (1), 13-4031, and 13-4032. The Court of Appeals affirmed the superior court order suppressing the evidence in an opinion filed June 20, 1985. The State's subsequent Motion for Reconsideration was denied on July 18, 1985. The State then petitioned the Arizona Supreme Court for review of the Court of Appeals' opinion under Rule 31.19, Arizona Rules of Criminal Procedure. The Arizona Supreme Court denied the petition on October 16, 1985. A petition for writ of certiorari was filed by the State of Arizona within 60 days of that denial. This Court granted

the petition on April 7, 1986. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

The pertinent part of the Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, ...

The pertinent part of the Fourteenth Amendment to the United States Constitution provides:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; . . . .

STATEMENT OF THE CASE

On April 18, 1984, a bullet fired through the floor of Apartment No. 10 at 13024 North 22nd Street, Phoenix, Arizona, struck and injured a man in the apartment below. Officers of the Phoenix Police Department responded to the call. (J.A. 13-14). A neighbor informed officers that just as the victim's wife ran screaming from the apartment below, a man came out onto the balcony of the apartment above, looked over the railing and then reentered the apartment. (J.A. 15). The apartment complex manager unlocked Apartment No. 10 to admit Phoenix Police Officers. Officers entered to look for other injured parties, the assailant, and his weapon. (J.A. 15, 25-26).

Upon entering the apartment, officers saw a .25-caliber automatic in plain view on the living room floor. They also found a stocking cap mask, a .45-caliber automatic, and a sawed off .22-caliber rifle and banana clip under the mattress of a bed. (J.A. 16). Officer Nelson observed very expensive stereo equipment in the living room and bedroom. (J.A. 16). The apartment was otherwise in a low-rent area, ill-kept, and littered with drug paraphernalia and alcoholic beverage containers. (J.A. 29). These observations, together with the officer's twelve years of police experience, caused Officer Nelson to suspect that the expensive, out-of-place stereo components were stolen. (J.A. 28-29).

Officer Nelson obtained the serial numbers from the Bang and Olufsen stereo turntable and other stereo components observed in plain view. To do this, he turned the stereo turntable and wrote down the serial numbers. (J.A. 19). From the apartment, Officer Nelson called the Identification Bureau who contacted the National Crime Information Center (NCIC). (J.A. 17). The computer operator informed Nelson that the turntable had been reported stolen. Officer Nelson thereafter seized the .25-caliber automatic, the .45-caliber automatic, the sawed-off .22-caliber rifle, and the Bang and Olufsen stereo turntable. (J.A. 18).

Officer Nelson returned to the police substation to obtain the departmental report cited by the NCIC computer operator. The report indicated that the turntable and other stereo components left in Hicks' apartment had been taken in an armed robbery on March 29, 1984. (J.A. 19). Nelson then briefed Officer Russler of the Phoenix Police Department on the results of his investigation and the circumstances of the shooting. Officer Russler independently reviewed the armed robbery report and compared the serial numbers of the stereo components listed as stolen, with the numbers on the turntable seized by Officer Nelson, and the numbers of the other components noted by Officer Nelson which were left in the apartment. Officer Russler drafted a search warrant affidavit based upon this information and presented it to a magistrate for review. (R.T. of November 7, 1984 at 34-36). The magistrate issued a warrant to seize a video recorder-player, a stereo receiver, a color television, drug paraphernalia, and identification papers. Officer Russler served and executed the warrant on Hicks' apartment several hours after the shooting. (*Id.*) Evidence seized pursuant to the warrant included drugs, drug paraphernalia, a box for a police scanner and information regarding the police scanner, makeshift masks, bandanas, handcuffs, .357-caliber ammunition, .22-caliber ammunition, .45-caliber ammunition, a sword, various items of identification belonging to defendant and other persons, and other stereo components taken in the March 29, 1984 armed robbery. (Search Warrant Return attached to Response to Motion to Suppress, filed October 16, 1984, Record on Appeal, Photostated Instruments at 21h-j).

On May 3, 1984, the Maricopa County Grand Jury indicted respondent, James Hicks, on charges of armed robbery and kidnapping, each class 2 dangerous felonies under the Arizona Criminal Code. The facts giving rise to these charges are as follows. On March 29, 1984, three male intruders awakened Ronald Jandrlich, age 17, at approximately 1:10 A.M. (J.A. 7). Ronald had been sleeping soundly in the bedroom of his home, where he lived with his mother, Joy Jandrlich. (*Id.*) The unknown assailants awoke Ronald and put a gun in his face. They threatened, blindfolded, tied, and beat him. Ronald's home was ransacked, and stereo equipment and other personal property were taken. (*Id.*) Ronald reported the robbery to Phoenix Police who undertook the investigation. A latent print was found in the Jandrlich home. (Motion to Withdraw, filed June 18, 1984, Record on Appeal, Photostated Instruments at 8). Only after the stereo unit was found in Hicks' apartment, were officers later able to positively identify this print as Hicks' fingerprint. (*Id.*)

Subsequently, the State filed an allegation pursuant to Arizona Revised Statutes Annotated § 13-604.01, alleging that the crimes charged were committed while the respondent was on parole and under the supervision of the Arizona Department of Corrections. (Allegation Pursuant to A.R.S. § 13-604.01, filed June 11, 1984, Record on Appeal, Photostated Instruments at 6). The State also amended the indictment to include an allegation of a prior armed robbery conviction. (Amendment of Indictment and Allegation of Prior Felony Conviction, filed June 11, 1984, Record on Appeal, Photostated Instruments at 7).

Thereafter, Hicks filed a motion to suppress all items seized from Apartment No. 10, 13024 North 22nd Street, on April 18, 1984. Hicks claimed that the entry into his apartment and the search without a warrant violated his Fourth Amendment rights. The State responded that the entry was justified by exigent circumstances and that the officers had the right to seize fruits of a crime in plain view once lawfully in the apartment. (J.A. 8-9). Respondent argued that *Coolidge v. New Hampshire*, 403 U.S. 443 (1971) (plurality opinion), set forth three basic requirements before the plain view exception to the Forth Amendment is applicable. Conceding that the initial entry was lawful, Hicks maintained that discovery of the

stereo was not inadvertent because officers had been in the apartment for some time conducting a search for additional injured parties, suspects and weapons, and the incriminating nature of the evidence was not immediately apparent. (J.A. 32-33).

On November 7, 1984, the Maricopa County Superior Court held an evidentiary hearing on the pending motion to suppress. At that hearing, Hicks conceded that he was not challenging the affidavit or the warrant, or the execution of the warrant. The State stipulated that respondent was the lessee of Apartment No. 10, and as such was responsible for payment of the lease and utilities. Officer Nelson testified that the reason he checked the serial numbers on the stereo equipment was:

> Because it was an item of value. In over twelve years of police experience I know those things are stolen a lot and I just decided to check the serial numbers.

(J.A. 23). Nelson told the court that he had also found a mask, illegal weapons, and recognized the name of one tenant from other police work. Nelson continued:

> I have worked in different burglary crimes throughout that period of time and, you know, I'm just very familiar with people converting stolen stereos and TVs into their own use. Just the appearance of the apartment.
>
> THE COURT: What was the appearance of the apartment?
>
> THE WITNESS: Well, it was rather sloppily kept. It was just a lot of junk, a lot of cases of alcohol around. We did find some drug paraphernalia items around. These things were just built into my suspicion.
>
> . . . .
>
> THE COURT: Did it [the stereo equipment] appear out of place in that apartment?
>
> THE WITNESS: Yes, it did.

(J.A. at 29).

Nelson admitted that he did not know the stereo turntable was stolen until the NCIC computer operator confirmed that the serial

number matched that of a stereo turntable reported as stolen. The Maricopa County Superior Court granted the motion to suppress and the State appealed. Without the stereo turntable and the fingerprint evidence derived therefrom, the State was forced to dismiss its prosecution pending appeal.

On appeal, the Arizona Court of Appeals affirmed the superior court order suppressing the evidence under the Fourth Amendment to the United States Constitution. The Court of Appeals held that the recording of serial numbers from a suspicious stereo unit involved an additional unlawful search, unrelated to the exigency justifying entry. The Arizona Supreme Court refused to review the Court of Appeals' opinion.

SUMMARY OF ARGUMENT

The Fourth Amendment of the United States Constitution guarantees the right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures. This Amendment protects two basic interests, one involving "searches" and the other "seizures". A search occurs when the expectation of privacy that society is prepared to consider reasonable is infringed. A seizure occurs when there is some meaningful interference with an individual's possessory interest in that property. Without an infringement of the expectation of privacy or a meaningful interference with an individual's possessory interest, the Fourth Amendment is not implicated and evidence should not be excluded on that basis.

First, recording serial numbers from the exterior of an item of personal property does not interfere with an individual's possessory interest in that property. The identification number was not separated from the stereo unit, nor was the stereo itself seized until it was determined to have been stolen. Officer Nelson's notation of the serial number did not dispossess Hicks of the serial number or the stereo. *Hale v. Henkel*, 201 U.S. 43, 76 (1906). Clearly, there was no Fourth Amendment seizure.

Secondly, the inspection of the stereo unit to locate the serial number was not a search. Hicks concedes that his apartment was entered under objectively reasonable circumstances. Officers were investigating a shooting and had reason to believe that the suspect,

his weapon, and possibly other injured parties might be found in Hicks' apartment. The exigent circumstances that brought officers into the apartment constituted a reasonable infringement of Hicks' right of privacy. Once inside the apartment, the plain view doctrine extended the previous justification for the search to all objects in plain view. "Once police are lawfully in a position to observe an item first-hand, its owner's privacy interest in that item is lost; . . . ." *Illinois v. Andreas*, 463 U.S. 765, 771 (1983).

Petitioner submits that there is no right of privacy in the serial numbers on the exterior of an object in plain view, regardless of whether the numbers are visible to the officer. The right of privacy should attach to the object, not the number. Society does not separate the interest in the object from the number. This Court should not impose such an artificial distinction for Fourth Amendment purposes. Moreover, even if this Court were to find that moving the stereo unit was a technical infringement of the right of privacy in the identification numbers on the unit, the intrusion is minimal. Police should not be forced to turn their backs on evidence of crime when they have a reasonable suspicion that an object in plain view is stolen.

Balancing the competing Fourth Amendment interests against the legitimate governmental interests, the interest in effective law enforcement outweighs that of the individual's possessory interest in the property. The limited inspection of the property to ascertain the identification number is a minimal intrusion compared to the importance of the information to police officers who have a duty to investigate stolen property. If the property is not stolen, no further intrusion is required, and the police have had the opportunity to stop the escalating wave of crimes involving stolen property.

Assuming *arguendo* that Fourth Amendment interests are implicated in recording the serial numbers from the stereo unit, the Fourth Amendment prohibits only *unreasonable* searches and seizures. Officer Nelson acted in an objectively reasonable manner under the totality of the circumstances. Evidence thus seized should not be suppressed. Petitioner submits that an officer performing a lawful search may, on "reasonable suspicion," conduct a closer examination of an item in plain view; and if by the end of the search there is probable cause to believe the item is evidence of a

crime, it may be seized.

The privacy and possessory interest in a serial number on the outside of an item of personalty in plain view is limited. When weighed against the governmental interest in investigating suspected criminal activity, such a search or seizure is "reasonable" if based on a reasonable suspicion of criminal activity.

Police officers face enormous difficulties in investigating the increasing numbers of burglaries and robberies. Patient skills are needed by those officers charged with halting the ever increasing number of property crimes. In solving these crimes, trained officers should not have to ignore objective facts, combined with permissible deductions from those facts, that could form a legitimate basis for suspicion of a particular person and for action on that suspicion.

There can be little doubt that the officer herein had a reasonable suspicion that criminal activity was afoot in Hicks' apartment. Officer Nelson observed the expensive stereo unit when he entered the apartment. It was totally out of context with the furnishings and the otherwise low-rent apartment. However, it was after officers recovered guns and a mask (stocking cap with a hole cut out of it), which were obviously the instrumentalities of crime, and he recognized the name of one of the subjects that lived there from prior police work, that Officer Nelson took action on his suspicion.

These facts raised a sufficient degree of suspicion that the officer would have been remiss in his duty had he not investigated further, and it surely justified the minimal privacy intrusion involved in turning the stereo unit to observe the serial number.

If anything, a review of the lower court cases demonstrates the lack of clarity with which the courts have addressed the plain view issue. These decisions hardly establish clear principles of law pertaining to searches and seizures of which Officer Nelson should have been aware.

Regardless of how this Court ultimately resolves this issue, whether on the basis of a search analysis or a seizure analysis, the evidence should not be excluded. As this Court recently recognized in *United States v. Leon*, 468 U.S. _____, 104 S.Ct. 3405 (1984):

> [A]ssuming that the [exclusionary] rule effectively deters some police misconduct and provides incentives for the

> law enforcement profession as a whole to conduct itself in accord with the Fourth Amendment, it cannot be expected, and *should not be applied to deter objectively reasonable law enforcement activity*.

Id. 104 S.Ct. at 3419 (emphasis added). Objectively reasonable conduct by police officers should be encouraged, not discouraged. Officer Nelson acted on reasonable, articulable, suspicion. Suppression of this evidence because of such a minimal intrusion, provides no societal benefit that outweighs the cost of freeing an armed robber and kidnapper.

ARGUMENT

Petitioner submits that the trial court improperly concluded that (1) the recording of the serial number implicated a Fourth Amendment interest, (2) Officer Nelson acted unreasonably under the totality of the circumstances, and (3) exclusion was an appropriate sanction for the minimal intrusion of turning an object in plain view to look at and record the serial number. Petitioner will discuss each issue separately.

I.

RECORDING SERIAL NUMBERS FROM A STEREO UNIT IN PLAIN VIEW DOES NOT IMPLICATE A FOURTH AMENDMENT INTEREST.

The Fourth Amendment of the United States Constitution provides in pertinent part:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, ...

This amendment protects two basic interests, one involving "searches", the other "seizures." A search occurs when an expectation of privacy that society is prepared to consider reasonable is infringed. *Maryland v. Macon*, 472 U.S. _____, _____, 105 S.Ct. 2778, 2782 (1985); *United States v. Jacobsen*, 466 U.S. 109, 113

(1984); *Segura v. United States*, 468 U.S. 796, _____, 104 S.Ct. 3380, 3389 (1984). A seizure occurs when there is some meaningful interference with an individual's possessory interest in that property. *Maryland v. Macon*, 472 U.S. at _____, 105 S.Ct. at 2782; *United States v. Jacobsen*, 466 U.S. at 113. Without an infringement of the expectation of privacy, or a meaningful interference with an individual's possessory interest, a Fourth Amendment interest is not implicated, and exclusion of evidence on that basis is unwarranted.

A. The inspection of the stereo unit to locate the serial number was not a search.

A search occurs when an expectation of privacy that society is prepared to consider reasonable is infringed. *Maryland v. Macon*. A search, however, may be constitutionally permissible if it is conducted pursuant to a warrant or under an exception to the warrant requirement.

In this case, the Arizona Court of Appeals held that the recording of serial numbers from a suspicious stereo unit, unrelated to the exigency justifying entry, involved an additional and unlawful search. The Court of Appeals found that the search of the stereo was not justified by the exigent entry to investigate the shooting. Petitioner submits that the inspection of the stereo unit to locate the serial number was not a search. Moreover, the search of property in plain view involves no invasion of privacy and is presumptively reasonable, assuming that there are particularized articulable reasons to associate the property with criminal activity. [*See infra* Argument II (B)].

Hicks concedes that his apartment was entered under objectively reasonable circumstances. (J.A. 32). Officers were investigating a shooting and had reason to believe that the suspect and the weapon would be in Hicks' apartment. Moreover, officers did not know the circumstances of the shooting and feared that other injured parties might be found in the apartment. (J.A. 28-29). The exigent circumstances that brought officers into the apartment constituted a reasonable infringement of Hicks' right of privacy. Once inside the apartment, the plain view doctrine extended the previous justification for the search to all objects in plain view.

It is well settled that "once police are lawfully in a position to observe an item firsthand, its owner's privacy interest in that item is lost; . . . ." *Illinois v. Andreas*, 463 U.S. at 771. In *Texas v. Brown*, 460 U.S. 730 (1983), this Court explained that:

> The principle is grounded on the recognition that when a police officer has observed an object in "plain view," the owner's remaining interests in the object are merely those of possession and ownership, ...

Id. at 739 (citations omitted).[1]

Petitioner submits that there is no right of privacy in the serial numbers on the exterior of an object in plain view, regardless of whether the numbers are visible to the officer.[2] The right of privacy should attach to the object, not the number. Society does not separate the interest in the number from the object.

In *United States v. Gunn*, 428 F.2d 1057 (5th Cir. 1970), the Fifth Circuit found that determining the serial numbers of the tires on an automobile was not a search within the Fourth Amendment.

---

[1]Petitioner submits that any right to possession and ownership must be legitimate. Society does not have an interest in protecting illegitimate interests. Consequently, the problem in this case is further compounded because unless officers breached the privacy interest in Hicks' apartment, Hicks had no legitimate expectation of privacy in the stolen stereo unit or the serial numbers imprinted thereon. Having asserted his privacy right in the place searched, i.e., his apartment, Hicks has no right to assert any interest in the stereo unit. That item of personalty is stolen property and actions by police officers in recovering the stereo unit do not impact on Hicks' legitimate property interest.

[2]This case should be distinguished from cases wherein the serial numbers are located inside the stereo unit. Different interests may be involved where officers must dismantle the object to observe an identifying number.

> The inspection of tires on a motor vehicle, performed by police officers entitled to be on the property where the vehicle was located, which in no way damaged the tires or the vehicle and was limited to determining the serial numbers of the tires was not a search within the Fourth Amendment. Alternatively, if the inspection is deemed to have constituted a Fourth Amendment "search," a search warrant was not necessary because the inspection was reasonable and did not violate Gunn's right to be secure in her person, house, papers, or effects.

Id. at 1060 (citations omitted).

This Court should not impose an artificial distinction between an object and the serial number thereon for Fourth Amendment purposes. Moreover, even if this Court were to find that moving the stereo unit was a technical infringement of the right of privacy in the identification numbers on the unit, the intrusion is minimal. Police should not be forced to turn their backs on evidence of crime where they have a reasonable suspicion that an object in plain view is stolen.

This Court has previously recognized:

> Thus, the permissibility of a particular law enforcement practice is judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests.

Delaware v. Prouse, 440 U.S. 648, 654 (1979). Balancing the interests here, the interest in effective law enforcement outweighs that of the individual's possessory interest in the property. The limited inspection of the property to ascertain the identification number is a minimal intrusion compared to the importance of the information to police officers who have a duty to investigate stolen property. If the property is not stolen, no further intrusion is required, and the police have had the opportunity to stop the escalating wave of crimes involving stolen property.

In *New York v. Class*, 54 U.S.L.W. 4178 (U.S., Feb. 25, 1986), this Court explained that while a citizen does not surrender the protections of the Fourth Amendment by entering an automobile, the State's intrusion into a particular area, whether in an automobile or elsewhere, cannot result in a Fourth Amendment violation unless the area is one in which there is a "constitutionally protected reasonable expectation of privacy." *Id.* at 4179 (citations omitted). The Court reasoned that: "[t]he factors that generally diminish the reasonable expectation of privacy in automobiles are applicable *a fortiori* to the VIN [Vehicle Identification Number]." *Id.* at 4180.

The Court pointed out that automobiles are justifiably regulated by the State. Drivers must expect that the State in enforcing its regulations will intrude upon the operator's privacy to some extent; and on occasion, such intrusion will include the determination of the VIN of his or her vehicle. Consequently, the individual's reasonable expectation of privacy in the VIN is thereby diminished. It is unreasonable to have an expectation of privacy in an object required by law to be located in plain view from the exterior of the automobile. The Court therefore concluded:

> In sum, because of the important role played by the VIN in the pervasive governmental regulation of the automobile and the efforts by the Federal Government to insure that the VIN is placed in plain view, we hold that there is no reasonable expectation of privacy in the VIN.

Id.

By analogy here, while a citizen does not surrender the protection of the Fourth Amendment to his home, once officers are lawfully present there, the expectation of privacy in serial numbers on the exterior of objects in plain view is greatly diminished.

Petitioner submits that the serial number on an item of personalty serves the same identifying purpose as the VIN. Once the item of personalty comes within the purview of officers lawfully present, the Fourth Amendment will not extend to create a right of privacy in the number itself. Consequently, Officer Nelson did not infringe on any right of privacy, and the Fourth Amendment was not violated. Suppression of the stereo unit was therefore erroneous.

B. Recording serial numbers does not constitute a seizure.

Recording serial numbers from an item of personal property does not interfere with an individual's possessory interest in that property. Consequently, there is no Fourth Amendment seizure. *Maryland v. Macon; United States v. Jacobsen.*

In discussing what constitutes a seizure, this Court has stated

that "the substance of the offense is the compulsory production of private papers," and acknowledged that "a seizure contemplates a forcible dispossession of the owner." *Hale v. Henkel*, 201 U.S. at 76. Moreover, several recent decisions of this Court have reiterated the view expressed in *Hale* that the owner must be dispossessed of the item in question in order for a seizure to occur.

In *United States v. Jacobsen*, this Court stated:

> A "seizure" of property occurs when there is some meaningful interference with an individual's possessory interests in that property.

Id. at 113 (footnote omitted). A similar view was expressed by the concurring Justices in *Texas v. Brown*, 460 U.S. at 747, who observed that:

> The [Fourth] Amendment protects two different interests of the citizen — the interest in retaining possession of property and the interest in maintaining personal privacy. A seizure threatens the former, a search the latter.

In the case at bar, Officer Nelson initially observed the stereo unit as he entered Apartment No. 10. (J.A. 16).[3] Nelson testified that it was the incongruity of the stereo to its surroundings that drew his attention to it. Therefore, when the apartment had been fully secured, Officer Nelson wrote down the serial number of the stereo components. To observe the number on the stereo turntable, Officer Nelson turned the unit. He did not unplug it or dismantle it. He wrote the number down on a general information card as an aid to his memory. (J.A. 24). Nelson then telephoned the Phoenix

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[3]The initial observation of the stereo unit was contemporaneous with entry and not after the exigency had been resolved. Inasmuch as police officers had the authority to inspect the stereo at the time they first saw it, the fact that they did not do so immediately does not make the subsequent action unlawful. *See United States v. Edwards*, 415 U.S. 800, 804-805 (1974) (Fourth Amendment does not require exclusion of evidence taken from defendant ten hours after his lawful arrest).

Police Department Identification Bureau. The clerk at the Identification Bureau checked the serial numbers in the NCIC computer. She reported that the Bang and Olufsen component had been stolen. (J.A. 17).

The pronouncements of this Court plainly support the contention that Officer Nelson's observations did not amount to a seizure because this act did not interfere with Hicks' possessory interest in the serial number. The identification number was not separated from the stereo unit, nor was the stereo itself seized until it was determined to have been stolen.

Moreover, the characterization of Nelson's actions as a seizure could lead to illogical factual distinctions for Fourth Amendment purposes. For instance, if an officer had extraordinary memory abilities enabling him subsequently to recall the number accurately without the aid of notes, he probably would be held not to have seized the information. On the other hand, his more forgetful counterpart, who required a memory aid, could be considered to have effected a seizure.

Petitioner recognizes that several courts have held that note-taking during the course of a search may constitute a "seizure" for Fourth Amendment purposes. *See United States v. Gray*, 484 F.2d 352 (6th Cir. 1973), *cert. denied*, 414 U.S. 1158 (1974); *Sovereign News Co. v. United States*, 690 F.2d 569, 573 (6th Cir. 1982) (found seizure but not an illegal seizure); *United States v. Sokolow*, 450 F.2d 324 (5th Cir. 1971); *but compare, United States v. Marbury*, 732 F.2d 390 (5th Cir. 1984).

In *United States v. Gray*, police officers were searching a residence pursuant to a warrant directed at the seizure of alcoholic beverages. During the course of the search, officers removed several rifles from a closet, examined them, and recorded the serial numbers. When a computer check was subsequently run on the rifles, it was learned that the items were evidence of a crime.

It is not clear from its opinion at what moment the court considered illegal seizure to have occurred. At one point, the Sixth Circuit indicated that seizure occurred when the rifles were taken out of the closet (484 F.2d at 355), but at another point, the court, without analysis, stated that recording the serial numbers on the rifles was also a seizure. *Id.* at 356. Similarly, in *United States v. Sokolow*,

450 U.S. at 325-326, it was assumed, without discussion, that where police enter a garage and copy down the serial numbers of air conditioners, they had seized the information for purposes of the Fourth Amendment. By contrast, in *United States v. Marbury*, officers recorded identification numbers from several items of equipment not named in the warrant but believed to be stolen. The court found seizure of the equipment proper considering the fact that the items in question were in plain view and officers did not have to use particularly intrusive means to retrieve the numbers. The court did not discuss whether or not the recording of the identification numbers constituted a "seizure" for Fourth Amendment purposes.

To the extent that the above-noted cases stand for the proposition that the taking of handwritten notes can constitute a seizure for Fourth Amendment purposes, we submit that the cases are wrongly decided. They are plainly inconsistent with the definition of a seizure as developed in opinions of this Court such as *Hale v. Henkel*, *United States v. Jacobsen*, and *Texas v. Brown*.

If anything, these cases demonstrate the lack of clarity with which courts have addressed the seizure issue. The decisions concerning note-taking hardly establish a clear principle of law pertaining to seizures of which Officer Nelson should have been aware. Regardless of the legal theory this Court applies to resolve this issue, whether on the basis of search analysis or seizure analysis, the evidence should not be excluded.

II.

ASSUMING *ARGUENDO* THAT FOURTH AMENDMENT INTERESTS ARE IMPLICATED IN THE RECORDING OF SERIAL NUMBERS FROM THE STEREO UNIT, THE FOURTH AMENDMENT PROHIBITS ONLY UNREASONABLE SEARCHES AND SEIZURES.

A. An officer performing a lawful search may conduct a closer inspection of the item in plain view.

Relying on the plurality opinion in *Coolidge v. New Hampshire*,

the trial court suppressed the stereo turntable and evidence of identification because the incriminating character of the component was not immediately apparent to Officer Nelson. The court reached this conclusion because Nelson did not know the stereo was stolen until he had telephoned the Identification Bureau who contacted the National Crime Information Center.

The trial court ruled:

> Anything that they got as a result of this, of just curiosity about the turntable and the fact that it — the officer did not immediately realize that it was the subject of a crime, then I think it was illegally looked at and seized.

(J.A. 36).

In *Coolidge v. New Hampshire*, this Court announced a plain view exception to the warrant requirement. The opinion held that a seizure is justified by the plain view exception only when:

(1) the police have a prior justification for the intrusion;

(2) when the discovery of the evidence is inadvertent; and

(3) the incriminating character of the object is "immediately apparent".

In the case at bar, there is no question that the first and second prongs of the *Coolidge* test have been met. Phoenix Police Officers entered Hicks' apartment to investigate a shooting. They were looking for other injured parties, the assailant, and his weapon. There is nothing in the record to suggest that officers had any idea that they would find evidence of an armed robbery. The critical question presented here is to what extent reasonable suspicion will justify Officer Nelson's inspection of the stereo to satisfy the third prong of *Coolidge*.

In *Texas v. Brown*, this Court recognized:

> Decisions by this Court since *Coolidge* indicate that the use of the phrase "immediately apparent" was very likely an unhappy choice of words, since it can be taken to imply that an unduly high degree of certainty as to the incriminatory character of evidence is necessary for application of the "plain view" doctrine.

460 U.S. at 741. In *Brown*, police officers set up a routine driver's license checkpoint. When the defendant's automobile was stopped at the checkpoint, police officers observed an opaque party balloon, knotted at the tip, in the automobile. The officer knew that illegal drugs were sometimes concealed in this manner. When the driver could not produce a driver's license, he was requested to get out of the automobile; the balloon in the automobile was found to contain heroin, thereby resulting in the defendant's conviction for possession of heroin.

The Texas Court of Appeals determined that the plain view doctrine could not authorize the seizure, because the officer could not have known it contained heroin. This Court reversed.

In discussing the plain view doctrine, this Court acknowledged:

> [O]ur decisions have come to reflect the rule that if while lawfully engaged in an activity in a particular place, police officers perceive a *suspicious* object, they may seize it.

Id. at 739 (emphasis added). This Court held that objects in plain view may be seized if:

> [T]he facts available to the officer would "warrant a man of reasonable caution in the belief," that certain items may be contraband or stolen property or useful as evidence of a crime; it does not demand any showing that such a belief be correct or more likely true than false.

Id. at 742 (citation omitted). Applying this test, the Court concluded that the officer had probable cause to believe that the balloon contained illegal drugs; therefore the officer properly seized it.

In the case at bar, although Officer Nelson lacked probable cause to seize the stereo unit initially, he could reasonably conduct a closer inspection. The stereo turntable was in the living room on a homemade shelf along one wall. (J.A. 16-17). The serial number of the component was not visible. Nelson recorded the serial number after turning the unit so that he could read the identification number. He could not remember whether the serial number was on the back or under the unit. (J.A. 19). Officer Nelson testified that the stereo unit looked suspicious, and out of context with the low-rent, ill-kept apartment. He did not, however, immediately

connect the stereo component with evidence of a specific crime. (J.A. 28-29).

The problem generally expressed with any inspection of objects observed in plain view is that the officer would emasculate the protection afforded by the warrant requirement. An officer cannot inspect or examine every item that falls within his vision without contravening the constitutional prohibition against "exploratory rummaging." Consequently, the incriminating nature of the object must be immediately apparent.

Petitioner maintains that when in the course of a legal warrantless search a police officer comes upon a suspicious object, he is entitled to inspect it and, if it consists of fruits, instrumentalities, or evidence of crime, to seize it, even though the crime was not that which justified the search. *Harris v. United States*, 331 U.S. 145, 154-55 (1947); *United States v. Ochs*, 595 F.2d 1247, 1256-57 (2nd Cir. 1979) and cases cited therein. In other words, an officer performing a lawful search may, on "reasonable suspicion," conduct a closer examination of an item in plain view; if by the end of the search there is probable cause to believe that the item is evidence of a crime, it may be seized. *United States v. Willams*, 737 F.2d 594, 605 (7th Cir. 1984).

Many lower court cases support petitioner's argument that identification numbers may be checked and utilized based upon a variety of legal theories. For example, in *United States v. Wright*, 667 F.2d 793 (9th Cir. 1982), the Ninth Circuit reasoned:

> The incriminating nature of an item, however, may not be immediately apparent without a closer inspection of the item. This raises the issue: when may an officer minutely inspect an item found in plain view to determine whether it is evidence of a crime? The cases indicate that an officer may conduct such an examination if he has a "reasonable suspicion" to believe that the discovered item is evidence.

Id. at 797-98 (footnote omitted); 2 W. LaFave, *Search and Seizure* § 4.11 (1978).

In *State v. Noll*, 116 Wis.2d 443, 343 N.W. 2d 391 (1984), the Wisconsin Supreme Court, quoting Professor LaFave reasoned as follows:

> "It is generally assumed that there is nothing improper

in merely picking up an unnamed article for the purpose of noting its brand name or serial number or other identifying characteristic to be found on the surface.

". . .

"[I]t does not necessarily follow that officers executing a search warrant have carte blanche authority to subject to close examination each and every item of personalty which falls within their sight during the course of the search for the described items. The cases cited earlier concerning the checking of external serial numbers do not support such a broad proposition, for in each instance there were some facts (albeit facts falling short of probable cause) suggesting that the object in question was stolen property . . . . Although the proposition is not expressly stated in the those decisions, the cases might be explained in this way: even 'mere inspection' of items seen but not named in the warrant must be reasonable, and for such a minimal intrusion to be reasonable the officers must first be aware of some facts and circumstances which justify a reasonable suspicion (not probable cause) that the items are the fruits, instrumentalities, or evidence of crime."

343 N.W.2d at 401-402, quoting 2 W. LaFave, *Search and Seizure* § 4.11 (1978) (footnotes omitted). Inspection by police in *Noll* of a television set for the purpose of noting a serial number was not unreasonable, and therefore did not violate the Fourth Amendment. The television was apparent to police as soon as they entered the kitchen, their presence in the kitchen was authorized by a valid portion of the search warrant permitting search for antique bookends, and the deputy had reasonable suspicion that the television was stolen based on his recollection that a similar set had been taken in a burglary of a home about 1½ miles away. The court affirmed the seizure of the television notwithstanding the fact that there was no probable cause to believe this set was stolen since it was a very common type of television. The court reasoned that the fact that such televisions were common demonstrated the need for obtaining the serial number.

In *State v. Riedinger*, 374 N.W.2d 866 (N.D. 1985), the Supreme Court of North Dakota held that there was probable cause to justify seizure of a microwave oven as stolen property upon verification of the oven's stolen character via radio by serial number under the plain view doctrine. The court held:

> [T]hat it is proper, within the "plain view" exception to the Warrant Clause, to look closely enough at a microwave oven, which was not in use and had to be lifted from the cooler upon which it was placed, in the course of an intense valid warrant search for drugs and money, to obtain its serial number, where the officers' experience and information led them to reasonably suspect it was stolen. The officers had probable cause to seize the microwave oven as contraband where they confirmed by radio while on the premises that it was stolen, even though it was not within the scope of the warrant which they were executing.

Id. at 876.

Similarly, in *State v. Carr*, 361 N.W.2d 397 (Minn. 1985) the Minnesota Supreme Court affirmed the seizure of a small warehouse of television sets, stereos and other items. The Court concluded that the officers had probable cause to seize these items because they had probable cause[4] to believe that defendant was in the business of trading drugs for stolen property and the "quantity and placement of the articles were such that they obviously were not on the scene for ordinary use." *Id.* at 400 (citations omitted).

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[4]The definition of probable cause varies from case to case. *See State v. Streitz*, 258 N.W.2d 768 (Minn. 1977) (probable cause based on belief that defendant was part of burglary ring and finding of unusual number of items with serial numbers removed or obliterated); *but compare*, *State v. Galloway*, 232 Kan. 87, 652 P.2d 673 (1982) (probable cause to believe keys were evidence of nonforcible burglaries), and *State v. Vaster*, 24 Wash.App. 405, 601 P.2d 1292 (1979) (probable cause to believe cameras were stolen property based on incongruity with surroundings, among other things).

In *State v. Proctor*, 12 Wash.App. 274, 529 P.2d 472 (1974), the Washington Court of Appeals did not reach the "probable cause to seize" issue but found an intermediate response appropriate.

> In other words, police who are rightfully upon a citizen's property for a limited purpose may not rummage about in the hope or expectation that incriminating evidence or contraband will turn up. But that is not this case. The information which the police had about Proctor, coupled with the incongruity of the items seen in the business office, gave the officer probable cause to believe that he was looking at stolen property. It was reasonable for him to note the serial numbers. Moreover, in police work, circumstances sometimes develop in which an intermediate response is appropriate. If a police officer has a "well-founded suspicion not amounting to probable cause" that a person has, is, or is about to commit a crime, that person may be detained for investigatory purposes without an arrest. The temporary detention may continue while the officer questions other persons present or radios police headquarters to check the information gained. A noting of the serial numbers on the calculators was such an intermediate response.

Id. at 474 (citations omitted).

Similarly, in *State v. Glover*, 60 Ohio App.2d 283, 396 N.E.2d 1064 (1978), the accused gave police officers permission to search his premises for a green suede coat without a warrant. In the course of their inspection of a closet, officers copied down the serial numbers of a Pentax camera. Officers conceded that at that point in time, they were not aware that the camera had been stolen, but after returning to the police station they determined that the camera was stolen. They later seized the camera pursuant to warrant. The Ohio Court of Appeals found that the seizure of the evidence was constitutional. The court reasoned:

> The record before us supports the state's contention that the officers were lawfully in the place where they observed certain contraband in plain view. The nature of the contraband as such must have surely suggested to

> prudent police officers the probability that the existence of scales, measuring devices, straining spoons, etc., were not the instruments used by a consumer of the hallucinogen or drug but were rather the tools of one engaged in trafficking in this illicit contraband. The officer's view in the closet was permitted by the appellant and the copying down of the camera's serial number on the shelf in the closet was, in our opinion, good police practice. It is well known that one who traffics in illicit drugs is often the recipient of stolen goods by the barter system.
>
> Measured against the minor peril to Fourth Amendment protections, there seems to us to be a major gain in effective law enforcement action where officers, under facts such as those before us, copy serial numbers of articles which are readily traceable. It is noted here that the officers did not seize the camera until they had ascertained that it was, in fact, stolen property and then the seizure was accomplished with the appropriate warrant.

Id. at 1067-68.

Finally, in *Basham v. Commonwealth*, 675 S.W.2d 376 (Ky. 1984), the Kentucky Supreme Court refused to follow *United States v. Gray*. It found that the examination of property, suspected of being stolen, in plain view while on a lawful search and copying down serial numbers did not constitute an unreasonable seizure. Moreover, the court found nothing inherently unconstitutional in the use of computers to assist a police investigation. The Court explained:

> [T]he complaint here is that the officers could not confirm that the property was stolen or contraband until they ran a check through the National Crime Information Center (NCIC) computer. Appellant Scott cites *United States v. Gray*, 484 F.2d 352 (6th Cir., 1973). On appeal from the United States District Court for the Eastern District of Kentucky, the Sixth Circuit Court of Appeals held that the actions of the state police in removing rifles from the defendant's closets, examining them, and copying down the serial numbers, while carrying out a warrant directed to seizure of alcoholic beverages, could not be justified under the "plain view" doctrine.

> The court in *Gray* concludes that the police officers' acts in handling the guns, constituted "a seizure." We disagree. The mere act of examining the property in plain view while on a lawful search and copying down serial numbers does not constitute an unreasonable seizure.
>
> It would be . . . *unreasonable* to extend the Fourth Amendment to prohibit the activities of the police officers in obtaining the serial numbers from property on the premises that appear suspicious and later checking it through a computer. We find nothing inherently unconstitutional in the use of computers to assist a police investigation.

Basham v. Commonwealth, 675 S.W.2d at 383-384 (original emphasis).

It is clear from the cases cited that the courts interpreting the term "immediately apparent" as it relates to probable cause, have inconsistently applied these terms to a myriad of factual situations. These decisions offer little guidance to officers in the field. Petitioner requests this Court address the issue of "immediately apparent" in the context of the case at bar and hold that officers performing a lawful search may, on "reasonable suspicion," conduct a closer examination of an item in plain view, and if by the end of the search there is probable cause to believe that the item is evidence of a crime, it may be seized.

B. A warrantless seizure of property on the basis of reasonable suspicion that the property is stolen is not a violation of the Fourth Amendment.

The Fourth Amendment prohibits "unreasonable" searches and seizures. In determining whether the test of reasonableness has been satisfied, the courts must engage in a "balancing of competing interests." *Michigan v. Summers*, 452 U.S. 692, 700 n.12 (1981) quoting *Dunaway v. New York*, 442 U.S. 200, 219 (1979) (White, J., concurring). Specifically, the reasonableness of a search and seizure is judged by "balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests." *Delaware v. Prouse*, 440 U.S. at 654 (footnote omitted); *Brown v. Texas*, 443 U.S. 47, 50-51 (1979). Petitioner submits that the privacy and possessory interest in a

serial number on the outside of an item of personalty in plain view is so limited that, weighed against the governmental interest in investigating suspected criminal activity, such a search or seizure is "reasonable" when based upon a reasonable suspicion of criminal activity.

First, if an officer has a right to be present, the object in plain view is clearly subject to observation and thus cannot be regarded as wholly private. Moreover, the fact that Officer Nelson moved the stereo to view the serial number should not be considered a dispositive factor in a Fourth Amendment analysis. If an officer can change his position to view into a protected area from any number of different angles, there is little difference in terms of privacy in moving a smaller object to facilitate observation. *See Texas v. Brown*, 460 U.S. at 740; *State v. Riedinger*, 374 N.W.2d at 875 (picking up oven to check its serial number is not significant).

More important, the intrusion on Hicks' privacy when police viewed the serial number on an object in plain view is not remotely comparable to the intrusion that is involved when police enter a home or business premises or search through private papers. In the case of a search of a private residence or office, if the police are mistaken in their suspicion of criminal activity, they necessarily disrupt an area that people reserve for their most personal and private matters. The exposure of these matters to outsiders is a most severe intrusion into the privacy of the innocent individual.

If police err in viewing identifying numbers of an item in plain view, however, the consequences are much less severe. The observation and recording of these numbers is a minimal disruption of an individual's privacy. Exposure to the police of the back or bottom of an item of personalty in plain view is relatively unintrusive. In most cases, officers will observe only the identifying number on the object. The numbers of course are placed on the unit to facilitate identification, just as Vehicle Identifiation Numbers are placed in automobiles. *See New York v. Class*, 54 U.S.L.W. at 4180 (viewing vehicle identification numbers is not an invasion of the right to privacy). Because the invasion of privacy resulting from an erroneous search for identification numbers is substantially less in the

case of an object in plain view,[5] it is reasonable that a less stringent Fourth Amendment standard must be satisfied before such a search or seizure may occur.

This Court has recognized in other cases that the two basic constitutional prerequisites to a search of a residence do not necessarily apply where there is a substantially reduced privacy intrusion. For instance, a search of an automobile is a significantly lesser intrusion than a search of a residence. As this Court explained in *United States v. Chadwick*, 433 U.S. 1 (1977), quoting *Cardwell v. Lewis*, 417 U.S. 583, 590 (1974) (plurality opinion):

> One has a lesser expectation of privacy in a motor vehicle because its function is transportation and it seldom serves as one's residence or the repository of personal effects . . . . It travels public thoroughfares where both its occupants and its contents are in plain view.

Id. at 12. As a result, the warrant requirement is unnecessary to adequately protect the owner's privacy interests in the vehicle's interior.

Similarly, seizures that are a minimal intrusion compared to an arrest may be effected on less than probable cause. *See United States v. Cortez*, 449 U.S. 411 (1981); *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975); *Terry v. Ohio*, 392 U.S. 1 (1968). And in the context of administrative searches, where there is generally a reduced expectation of privacy, a search satisfies the "reasonableness" requirement of the Fourth Amendment despite an absence of probable cause to believe that a violation will be found, even where a residence is involved. *Donovan v. Dewey*, 452 U.S. 594, 598-602 (1981); *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 320-21 (1978).

In *United States v. Place*, 462 U.S. 696 (1983), this Court recognized the reasonableness of a warrantless seizure of personal luggage in the custody of the owner on the basis of less than probable

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[5]Petitioner submits that regardless of the justification for the officer's presence, whether by virtue of a warrant, hot pursuit, or exigent circumstances, the privacy interest in items of personalty so observed is the same.

cause, for the purpose of pursuing a limited course of investigation that would quickly confirm or dispel police suspicion. The Court applied the principles of *Terry v. Ohio*, to permit a seizure on the basis of reasonable, articulable suspicion, premised on objective facts, that the suitcase contained contraband or evidence of a crime. Specifically, the Court balanced the nature and quality of the intrusion against the importance of the governmental interests alleged to justify the intrusion, and concluded:

> When the nature and extent of the detention are minimally intrusive of the individual's Fourth Amendment interests, the opposing law enforcement interests can support a seizure based on less than probable cause.

Id. at 703.

In *Terry v. Ohio*, this Court described the governmental interest supporting the initial seizure of the person as:

> [E]ffective crime prevention and detection; it is this interest which underlies the recognition that a police officer may in appropriate circumstances and in an appropriate manner approach a person for purposes of investigating possible criminal behavior even though there is no probable cause to make an arrest.

Id. at 22. Obviously, the governmental intrusion in moving a stereo unit to view the serial number on the exterior unit is much less substantial than the seizure of a person, no matter how brief.

Also, in *United States v. Cortez*, this Court approved an investigative border stop based upon a particularized suspicion that the person stopped was engaged in wrongdoing. The Court recognized:

> [T]hat, when used by trained law enforcement officers, objective facts, that may well elude an untrained person, can be combined with permissible deductions from such facts to form a legitimate basis for suspicion.

Id. at 419. The Court explicitly acknowledged enormous difficulties of patrolling a 2,000 mile open border and the patient skills needed by those charged with halting illegal entry into the country.

Police officers also face enormous difficulties in investigating the

increasing numbers of burglaries and robberies. Just as in border patrol cases, patient skills are likewise needed by those officers charged with halting the ever increasing number of property crimes: property crimes can contribute to more insidious crimes of violence and stolen property may later be used in barter for drugs or fenced for money to support other illegal activity. In solving these crimes, trained officers should not have to ignore objective facts, combined with permissible deductions from those facts, that could form a legitimate basis for suspicion of a particular person and for action on that suspicion.

There can be little doubt that the officer herein had a reasonable suspicion that criminal activity was afoot in Hicks' apartment. Officer Nelson observed the expensive stereo unit when he entered the apartment. It was totally out of context with the furnishings and the low-rent apartment. However, it was only after officers recovered guns and a mask (a stocking cap with a hole cut out of it), which obviously were the instrumentalities of crime, and Officer Nelson recognized the name of one of the subjects that lived there from prior police work, that he took action based upon his suspicion. As Officer Nelson testified:

> [B]ased on 12 year's [sic] work of police experience. I have worked in different burglary crimes throughout that period of time and, you know, I'm just very familiar with people converting stolen stereos and TVs into their own use. Just the appearance of the apartment.

(J.A. at 28).

These facts raised a sufficient degree of suspicion that the officers would have been remiss in their duties had they not investigated further, and it surely justified the minimal privacy intrusion involved in turning the stereo unit to observe the serial number.[6]

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[6]Petitioner emphasizes that had the suspicions entertained by Officer Nelson proved to have been unfounded after the NCIC check, his actions would have produced no interference with Hicks' possession of the stereo, or other private effects.

III

THE SANCTION OF EXCLUSION IS INAPPROPRIATE WHERE THERE IS OBJECTIVELY REASONABLE LAW ENFORCEMENT ACTIVITY.

The fundamental purpose of the exclusionary rule is to protect society from unreasonable police conduct, by imposing the sanction of excluding otherwise admissible evidence, in order to deter future misconduct. This purpose is not served when officers are punished for objectively reasonable law enforcement activity. As this Court recently recognized in *Leon*:

> [A]ssuming that the exclusionary rule effectively deters some police misconduct and provides incentives for the law enforcement profession as a whole to conduct itself in accord with the Fourth Amendment, it cannot be expected, and should not be applied to deter objectively reasonable law enforcement activity.

United States v. Leon, 468 U.S. at _____ , 104 S.Ct. at 3419 (1984). In considering the suppression issue, the North Dakota Supreme Court observed that society has no interest in deterring objetively reasonable police conduct, stating:

> Society expects law enforcement officers to exhibit alertness and probing thoughtfulness, qualities inherent in their training and work, in seeking to solve crimes. It is unrealistic to expect officers to leave reasonable suspicions behind when they enter premises to execute a search warrant. Courts should not condemn such good law enforcement qualities unless compelled by overriding reasons.

State v. Riedinger, 374 N.W.2d at 872.

Moreover, this Court has repeatedly stated that it will consider the costs to society in determining whether exclusion is appropriate. *Stone v. Powell*, 428 U.S. 465, 489-491 (1976); *United States v. Janis*, 428 U.S. 433, 448-455 (1976) and *United States v. Calandra*, 414 U.S. 338, 348-351 (1974).

The substantial social costs exacted by the exclusionary rule for the vindication of Fourth Amendment rights have long been a source of concern. "Our cases have consistently recognized that unbending application of the exclusionary sanction to enforce ideals of governmental rectitude would impede unacceptably the truth-finding functions of judge and jury." An objectionable collateral consequence of this interference with the criminal justice system's truth-finding function is that some guilty defendants may go free or receive reduced sentences as a result of favorable plea bargains. Particularly when law enforcement officers have acted in objective good faith or their transgressions have been minor, the magnitude of the benefit conferred on such guilty defendants offends basic concepts of the criminal justice system. Indiscriminate application of the exclusionary rule, therefore, may well "generat[e] disrespect for the law and the administration of justice." Accordingly, "[a]s with any remedial device, the application of the rule has been restricted to those areas where its remedial objectives are thought most efficaciously served."

United States v. Leon, 468 U.S. at _____ , 104 S.Ct. at 3413 (citations and footnote omitted).

Suppression of the evidence in the case at bar will not deter other officers from misconduct. Officer Nelson, relying on his experience, objectively and reasonably assessed the facts available to him and concluded that the information warranted further investigation. This conduct does not warrant punishment. Officers have a duty and responsiility to investigate suspected stolen property, and should be encouraged to do so.

In investigating these facts, Officer Nelson acted with the utmost caution. Nelson inobtrusively examined the exterior of the stereo to locate the identification number. He did not dismantle or unplug the unit. Officer Nelson noted the number of the unit and called the Identification Bureau to determine if the stero was stolen. He did not seize the stereo *until* he had determined that it was stolen.

The exclusionary rule has never been interpreted to proscribe the use of illegally seized evidence in all proceedings or against all

persons. Petitioner submits that application of the rule should be restricted to those areas where its remedial objectives are best served. This is not such a case. Officer Nelson acted reasonably, objectively, and cautiously under the facts of this case. It is therefore inappropriate for a court to exclude reliable and probative evidence to punish this officer's reasonable conduct. The minimal intrusion here involves no cost to society that would outweigh the cost of freeing an armed robber and kidnapper.

CONCLUSION

The judgment of the trial court suppressing the stereo unit was erroneous. Neither the moving of the stereo unit nor the recording of its identifying numbers implicated a Fourth Amendment interest. However, even if a Fourth Amendment interest is involved, Officer Nelson's actions did not violate the Fourth Amendment's proscription against "unreasonable" searches and seizures. Officer Nelson was entitled to inspect the stereo and indeed had a duty to investigate facts giving rise to a reasonable suspicion of criminal activity. If by the end of his investigation there was probable cause to believe that the stereo was stolen, Officer Nelson had the duty to seize it. There is no measurable societal benefit to be served by proscribing and punishing this minimal intrusion that would justify the cost of letting an armed robber and kidnapper go free. The judgment of the trial court should be reversed.

Respectfully submitted,

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RESPONDENT'S

BRIEF

Supreme Court, U.S.
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No. 85-1027

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

STATE OF ARIZONA,

Petitioner,

v.

JAMES THOMAS HICKS,

Respondent.

On Writ Of Certiorari To The
Arizona Court Of Appeals

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STATEMENT OF THE CASE

On April 18, 1984, several policemen were called to a first floor apartment in Phoenix, Arizona. Someone had been shot there. (J.A. 14). They could tell the shot had come from the apartment above because of ". . . the bullet hole . . . in the ceiling." (*Id.*). Hicks leased the second floor apartment directly above the shooting.

One of the group, Officer Nelson, was sent to Hicks' apartment. By the time he arrived "about six" other officers were there. (J.A. 15). They had already ". . . determined that the suspect was not there." (*Id.*). This made Nelson feel ". . . that there [was] no danger to anyone." (J.A. 21). A .25 caliber automatic had been found by the time Nelson arrived. He was given the simple task of ". . . [checking] for any weapons that might be around." (*Id.*).

Nelson searched the apartment. He found two other guns between a mattress and a box spring. When he had ". . . searched anywhere where a weapon could be hidden" (J.A. 28) he began to check the serial numbers of the three guns that had been found against the police computer.

It was not "immediately apparent" (J.A. 26) that anything in the apartment was stolen, but while Nelson was waiting for the results on the firearms he thought ". . . as long as I am checking serial numbers, I may as well check serial numbers on the stereo items too." (J.A. 16). He started to rummage around the apartment again. He ". . . got the serial numbers on the speaker and the stereo components in the living room and of the stereo components in the northeast bedroom." (J.A. 17). When he got to the component at issue he could not see the serial number so he had to ". . . turn it upside down . . ." (J.A. 19).

Nelson called the stereo serial numbers in to the police computer. It told him that a single component, a Bang and Olufsen turntable, the part that Nelson had turned "upside down," was stolen. This was the first moment that Nelson had "anything" to give him even a "reasonable belief" that any of the components were stolen. (J.A. 23).

Based on these facts, the trial judge suppressed the use of the component and all evidence "discovered after the 'search' concerning the turntable." (J.A. 37). The Arizona Court of Appeals and Supreme Court affirmed that judgment.

SUMMARY OF ARGUMENT

The Fourth Amendment of the United States Constitution condemns any searches without probable cause.

The facts, the State of Arizona places before this Court, show a general search of James Hicks' apartment on April 18, 1984. Mr. Hicks had a reasonable expectation of privacy in the effects of that apartment even though police officers were in it because of an emergency. Officer Nelson violated that right of privacy by picking up various pieces of personal property, not related to the emergency, in searching for serial numbers on them. This violated not only the privacy interest of Hicks but also his possessory interest in that property.

While the stereo units searched by Officer Nelson were plainly visible, the serial numbers on them were not in plain view. The handling of the components and recording of the numbers on them was a violation of the search warrant requirement of the Fourth Amendment. It was a search and it was a seizure.

The State of Arizona relies on *Coolidge* v. *New Hampshire*, 403 U.S. 443 (1971) and cases interpreting it,

such as *Texas* v. *Brown* 460 U.S. 730 (1983), to justify the warrantless search. Since the serial numbers were not in plain view, such reliance is misplaced.

Respondent submits, even if the State of Arizona could overcome this hurdle, Petitioner cannot articulate reasons for this case to fall within the framework outlined in *Coolidge* for a warrantless search. To avoid the plain words of *Coolidge*, that a search of objects within the view of officers, conducting an otherwise lawful search, must be based on the "incriminating character" of them, the State of Arizona asks this Court to approve a search based on "reasonable suspicion." The reasonable suspicion of Officer Nelson according to the facts of this case was a hunch. If that hunch proved correct, then the Officer has probable cause to seize the item. The wording of *Coolidge* and the cases following it cannot be stretched to permit such conduct.

The essence of Petitioner's argument is that the economic status of Hicks gave Nelson a suspicion that he could not own an expensive stereo. Thus, it was stolen. There was no connection between the search and the exigency of entering the apartment. The Petitioner needs a reason to validate Nelson's actions. Cloaking this "status" search in arguments of minimal intrusions, legitimate governmental interest and finally an attack on the exclusionary rule, the State of Arizona asks this Court to expand the exceptions to the Warrant Clause.

None of the arguments can avoid the facts of this case nor can they articulate a reasonable basis for this search. To allow this sort of search, based upon guess work, would be condoning an uncalled for erosion of the Fourth Amendment's protections.

ARGUMENT

I

OFFICER NELSON'S RECORDING OF SERIAL NUMBERS INVOLVES FOURTH AMENDMENT INTERESTS.

A. The Inspection Of The Stereo Unit Was A Search.

The search of Hicks' apartment was a general search neither connected to the original intrusion nor based upon exigent circumstances. The Petitioner's argument that the inspection of the stereo component was not a search cannot stand when viewed in conjunction with the facts.[1] Officer Nelson did not see the numbers from afar nor did he get behind the unit and observe them. He deliberately walked to the system, picked up the turntable and then recorded the numbers.

As this Court recently observed, "[t]he touchstone of Fourth Amendment analysis is whether a person has a 'constitutionally protected reasonable expectation of privacy.'" (Citation omitted). *California* v. *Ciraolo*, ___ U.S. ___, 106 S.Ct. 1809, 1811 (1986). This concept derived from *Katz* v. *United States*, 389 U.S. 347 (1967) goes directly to the case at hand. The State of Arizona contends Hicks had no expectation in the privacy of his effects and moreover, since this property was in plain view, no invasion of privacy occurred and the search was presumptively reasonable. This ignores the facts.

The facts indicate that this is not a plain view case. Officers entered Hicks' home without a warrant based on the exigencies of the shooting. They did not enter to look for stolen property. There was nothing about the stereo

[1] The Arizona Court of Appeals did not address this issue since it was not raised on appeal.

units which would enable the officers to conclude they were stolen. The serial numbers were not visible to them.

Petitioner claims that once the officers were inside the apartment the plain view doctrine extends to handling or manipulating every object within their eyesight. Plainly, this is not the case. As announced in *Coolidge* v. *New Hampshire*, the doctrine has limitations. It still must be "immediately apparent" to the officers that the object searched is of an incriminating character. Even though police may be lawfully in a person's home and the owner of those objects observed no longer retains the same privacy interest enjoyed earlier, the plain view doctrine only

> ". . . authorizes seizure of illegal or evidentiary items visible to a police officer whose access to an object has some prior Fourth Amendment justification and who has probable cause to suspect that the item was connected with criminal activity."

Illinois v. *Andreas*, 463 U.S. 765, 771 (1983).[2]

To assert that no privacy interests are retained because objects can be seen by officers and therefore no search occurs flies in the face of the Warrant Clause. Petitioner further compounds this misconstruction by asserting that no privacy interest exists in serial numbers attached to an object visable to police officers. No serial numbers were visible to Officer Nelson. The stereo component was not inherently contraband nor was it "immediately apparent" to Nelson that it was stolen. (J.A. 26).

[2] The facts in *Texas* v. *Brown* are consistent with this interpretation of *Coolidge* while, the facts of the case herein are not. A majority of this Court in *Brown* recognized that *Coolidge* is and has been the law of this land for over a decade. (Powell, J. concurring).

The Petitioner contends that by failing to inspect the turntable, the police would have been turning their backs on evidence of a crime when they had reasonable suspicion that the item was stolen. This assertion is contradicted by the record in this case, which indicated that Officer Nelson had no basis to believe the object was stolen, prior to contacting the National Crime Information Center (NCIC). (J.A. 23).

Respondent submits that the instant case does not lend itself well to the kind of balancing analysis undertaken in *Delaware* v. *Prouse*, 440 U.S. 648 (1979), (intrusion on citizen's Fourth Amendment interest versus promotion of a legitimate governmental interest), because a rule conferring blanket authority to search for serial numbers would wholly abrogate the Fourth Amendment.

Prouse provides for a specific search in an area of specific governmental concern, to wit: stopping vehicles for highway safety. There is no indication that this Court intended to sanction general rummaging about one's home in order to assist police in their fight against crime. *Welsh* v. *Wisconsin*, 466 U.S. 740 (1984) and *Michigan* v. *Clifford*, 464 U.S. 287 (1984). Respondent also believes the State of Arizona's reliance on *New York* v. *Class*, ___ U.S. ___, 106 S.Ct. 960 (1986) is misplaced. *Class* turns on federal law which requires VIN numbers be placed in plain view of someone outside a vehicle. *Class*, therefore, held that an individual has no particular privacy interest in a VIN number. *Class* also turned upon the fact that the court has recognized that the physical characteristics of automobiles and the nature of their use result in lessened expectations of privacy. In addition, members of this Court recognized that there were Fourth Amendment concerns (which were satisfied) involved in the search for the VIN numbers. (Powell, J., concurring). Finally, *Class*

notes that since there is extensive regulation of automobiles by the states, the expectation of privacy in them is diminished. None of these considerations apply to immobile objects found in a personal residence.

Petitioner's reliance on other cases is also misplaced. In *United States* v. *Gunn*, 428 F.2d 1057 (5th Cir. 1970), it was heid that the inspection of serial numbers on the tires of an automobile was not a search. However, this decision makes no analysis of the search question and skips blithely on to the conclusion that if a search occurred, no warrant was necessary because the inspection "was reasonable and did not violate Gunn's right to be secure in her person, house, papers or effects." *Gunn* has little precedential value for the legal definition of a search under the Fourth Amendment. Since the officers could readily observe the serial numbers on the tires without disturbing them, this case has no application to Respondent's. Neither can it stand for the proposition that serial numbers are not protected by the Fourth Amendment.

B. The Recording Of Serial Numbers Was A Seizure.

Again ignoring the facts, the State of Arizona asserts that there was no seizure for Fourth Amendment purposes because the recording of serial numbers from property does not interfere with the owner's possessory interest in it. *Maryland* v. *Macon*, 472 U.S. ___, 105 S.Ct. 2778 (1985).[3] Petitioner fails in this argument to overcome the initial question of an illegal search. Without a showing that the search was proper all that flows from that search must be condemned. *Wong Sun* v. *United States*, 371 U.S. 471 (1963).

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[3] This issue, like the search issue, was not addressed in the Petitioner's appeal to Arizona Court of Appeals.

Without conceding the propriety of an officer copying down serial numbers clearly visible to him, Respondent submits the serial numbers in question were not observed in plain view. The act of lifting and turning the stereo component was a seizure and by so doing Nelson effectively seized the numbers. Writing down the numbers was just an additional seizure. One cannot, under the facts in this case, separate the unit and the numbers on it.[4]

In support of its argument, the Petitioner cites *United States* v. *Marbury*, 732 F.2d 390 (5th Cir. 1984). *Marbury* does not address the issue. In that case officers, executing a search warrant for stolen property, noticed equipment which fit the description of items previously reported stolen. Acting on that information, the officers copied down identification numbers and subsequently confirmed that the equipment was stolen. These facts are clearly distinguishable from those of the instant case. Additionally, they neatly fit into the rationale of *Coolidge*. No officer should turn his back on items in plain view which are clearly contraband or evidence of a crime.

United States v. *Gray*, 484 F.2d 352 (6th Cir. 1973), *cert. denied* 414 U.S. 1158, (1974) seems clearly on all fours with this case. Officers, executing a search warrant for the illegal sale of intoxicating liquors, removed rifles from a closet, copied down serial numbers and eventually determined the guns were stolen. There, as here, the court found no "immediately apparent" basis for the officers to believe the guns were of an incriminating nature. Thus, the search could be termed a general and exploratory one prohibited by the Fourth Amendment.

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[4] In contrast to Petitioner's position, the act of moving the stereo unit is the same as opening it up to inspect the inside of it. *Stanley* v. *Georgia*, 394 U.S. 557 (1969).

Similarly, *United States* v. *Sokolow*, 450 F.2d 324 (5th Cir. 1971) condemned the seizure of serial numbers on air conditioning units. There, as here, nothing about the air conditioners gave any indication they were contraband or evidence of a crime. Although the court in *Sokolow* found no justification for a warrantless entry into a garage to inspect the air conditioners, it did find that the officer's mere suspicion was insufficient to search and seize the items.

No theory presented by the Petitioner can contradict the fact that since the numbers on Hicks' stereo were not visible to Officer Nelson, he had to seize the stereo to get them. This deprived Respondent of his possessory interest in the unit.

II

THE SEARCH OF THE STEREO EQUIPMENT AND THE RECORDING OF THE SERIAL NUMBERS WAS UNREASONABLE AND PROHIBITED BY THE FOURTH AMENDMENT

A. An Officer May Not Conduct A Closer Inspection Of Objects, In Plain View, When They Are Neither Contraband Nor Related To The Exigency Of The Original Lawful Intrusion.

The fact that the stereo units were visible to officers while they conducted their otherwise lawful inspection of the apartment is not determinative of the legality of the search. In order to search an item in plain view, the object must be, by its nature, either contraband or evidence of a crime. Additionally, warrantless searches are circumscribed by the exigency justifying the initial intrusion. *Mincey* v. *Arizona*, 437 U.S. 385 (1978). Stereo units are not unusual nor are they out of place in anyone's home.

Simply because a poor person possesses a good turntable and speaker does not suggest that the set has been stolen.

The trial court found Officer Nelson was unable to articulate any reason for his belief that the stereo was stolen. It is not "immediately apparent" under the guidelines of *Coolidge*, that by looking at an ordinary stereo one can gleen that it is evidence of a crime.

While Petitioner concedes Officer Nelson lacked probable cause to seize the stereo (Brief for Petitioner p. 18), it feels that his mere suspicion gave him the right inspect it more closely. Petitioner also concedes that an officer contravenes the Fourth Amendment when he decides to inspect any item he wishes which falls within his vision while conducting a lawful search. This is a general search condemned by the Fourth Amendment.

In *United States* v. *Wright*, 667 F.2d 793 (9th Cir. 1982), the Ninth Circuit condemned the government seizure of a black ledger book while looking for a license (the subject of the search). The court conceded that officers might open the book to see if the license was there but could not more closely inspect it or show its contents to another agent. It was not "immediately apparent" that the book was incriminating nor were there any facts which gave rise to a reasonable suspicion that it was evidence of a crime.

Looking at Hicks' stereo did not give Nelson any reasonable suspicion that it was evidence of a crime. In *Wright* the court cited with approval *State* v. *Murray*, 84 Wash.2d 527, 527 P.2d 1303 (1974), *cert. denied* 421 U.S. 1004 (1974). That case involved officers tilting television sets in order to find serial numbers. Since nothing about the sets or their location indicated they were incriminating evidence, the "immediately apparent" requirement of

Coolidge was not satisfied. On the other hand, if serial numbers are missing from objects and that fact is apparent to officers by seeing it in plain view, the officers might reasonably believe the objects are contraband. *See State* v. *Sagner*, 12 Or.App 459, 506 P.2d 510 (1973).

Each of the state court cases cited by the Petitioner has a factual basis for concluding the search was not unreasonable. In *State* v. *Noll*, 116 Wis.2d 443, 343 N.W.2d 391 (1984), the inspection by police of a television set for its serial number resulted from their executing a warrant to search for stolen items. In that case, the Wisconsin Supreme Court found there was a reasonable suspicion, although not rising to probable cause, in the mind of the searching officer, that the TV matched the description of a stolen set reported to him earlier. Further, the court found an articulable suspicion that the item was connected to a crime because it was of the same type as the television which had been reported stolen and the victim's home was in close proximity to the searched residence.

State v. *Proctor*, 12 Wash.App. 274, 529 P.2d 472 (1974) upheld a search on the basis that police officers had been told that people in a target residence had been dealing in stolen property. Also, the quality and quantities of the property searched indicated that it was not for ordinary use. In addition, there was a warrant which authorized a search for stolen property.

In *State* v. *Reidinger*, 374 N.W.2d 866 (N.D. 1985) officers executed a warrant describing drugs and money. The court upheld the seizure of a microwave oven after police verified its stolen character through its serial number. The police were aware that the owners of the residence had previously been at the scene of a burglary. The microwave oven was in a distinctive location, and the

fact that it was not being used gave officers a reasonable suspicion that the item was stolen.[5]

State v. *Glover*, 60 Ohio.App.2d 283, 396 N.E.2d 1064 (1978) and *Basham* v. *Commonwealth*, 675 S.W.2d 376 (Kentucky 1984) are cases in which the state courts seem to be saying that the activity of police officers in searching items, which they consider suspicious, is of great importance in the effective administration of law enforcement. Apparently, society's Fourth Amendment protections must yield to the right of police to search out and find criminals. The reasoning used by these courts makes the Fourth Amendment unnecessary. Respondent would simply disagree with the Kentucky Supreme Court's refusal to follow *United States* v. *Gray* and finds the rationale of the Ohio Court in *Glover* illogical. While state courts have the duty to follow this Court's dictates, not all do. These decisions seem to be contrary to the decisions in *Brown* and *Coolidge*.

B. The Warrantless Seizure Of Property, In This Case, Was Unreasonable And Violated The Fourth Amendment.

The essence of Petitioner's argument is that this Court should carve out a new exception to the Warrant Clause and allow officer's mere suspicions to replace probable cause as the standard for a search. Although this Court in *Texas* v. *Brown* reserved the right to decide whether, in some circumstances, a lower degree of suspicion than probable cause would be sufficient to allow officers to conduct a search, the facts in the case at bar are not such

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[5] The dissenters on the Supreme Court of North Dakota felt there were insufficient grounds to associate the microwave oven with criminal activity and, therefore, under *Texas* v. *Brown*, concluded that it did not fall within the plain view exception to the Fourth Amendment.

as to allow this Court to set workable guidelines for that lower degree of suspicion.

Looking at testimony during the Motion to Suppress, Officer Nelson, whose sole purpose in being in that apartment was to search for weapons and suspects, said he took the numbers off the stereo because

> [I]t was an item of value. In over twelve years of police experience I know those things are stolen a lot and I just decided to check the serial numbers.

(J.A. 23). When questioned about his suspicions the following transpired:

> THE COURT: * * *
>
> All right. You said you were suspicious when you started looking at serial numbers. You were suspicious because of the fact that one of the officers found the gun or found three guns ultimately and the stocking with the [R.T. 30] holes in it. That is all your suspicion was based on?
>
> THE WITNESS: No, also based on 12 year's worth of police experience. I have worked in different burglary crimes throughout that period of time and, you know, I'm just very familiar with people converting stolen stereos and TVs into their own use. Just the appearance of the apartment.
>
> * * *
>
> THE COURT: All right. You think the stereo was an expensive stereo? I don't know this brand so—everybody seems to. Bang and something?
>
> THE WITNESS: Olufsen. I wasn't familiar with it but it looked like it was good stereo equipment. So it appeared expensive to me.

(J.A. 28-29). In addition, Officer Nelson said that the equipment looked more expensive than what the people

living in the apartment could afford. (J.A. 29). The type of house and the value of the equipment would never be sufficient cause to search without a warrant.

The whole history of the exceptions to the warrant requirement is based on the reasonableness of police conduct and where that conduct take place. *Terry* v. *Ohio*, 392 U.S. 1 (1968), for instance, bases the reasonableness of the search, when no probable cause exists, on the protection of the officer. It does not, as Petitioner would claim, create an exception to the warrant requirement solely on "effective crime prevention and detection." The test is whether the governmental interest is sufficiently substantial in the context of the investigation. *United States* v. *Place*, 462 U.S. 696 (1983). Here the apartment was secure, no danger to the officers existed and there was no cause to believe a property crime had occurred.

Respondent would submit, unless the items are contraband, there must be a connection between the items searched and the reason for being in the place searched. The facts of this case would allow officers to search for weapons, ammunition and suspects. If they came upon items which might reasonably be connected to the shooting, those items should be seized. In connection with the search, if police find items with are obviously contraband such as drugs, in plain view, they can be seized. Otherwise, the police had no right to rummage throughout the apartment. Officer Nelson could not, based on his observations of the stereo units, have gone to the nearest magistrate and provided him with an affidavit stating probable cause for a warrant to search the apartment. Stereos are not intrinsically illegal.

The Fourth Amendment protects

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures . . .

This Court has jealously guarded that Amendment's guarantees. In cases that define limits in the area of searches and seizures, one sound principle has always been maintained:

> Searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment.

Katz, 389 U.S. at 357. With only "a few specifically established and well-delineated exceptions" (*Id.*), searches without warrants are illegal.

As previously stated, one of those exceptions came about in *Coolidge*. *Coolidge* stands for the proposition that the "plain view doctrine" has validity because it is reasonable. On the other hand, it too has its limits. As the court said:

> . . . there must be 'a showing by those who seek exemption * * * that the exigencies of the situation made that course imperative.' '[T]he burden is on those seeking the exemption to show the need for it.' In times of unrest, whether caused by crime or racial conflict or fear of internal subversion, this basic law and the values that it represents may appear unrealistic or 'extravagant' to some. But the values were those of the authors of our fundamental constitutional concepts. In times not altogether unlike our own they won—by legal and constitutional means in England, and by revolution on this continent—a right of personal security against arbitrary intrusions by official power. If times have changed, reducing every man's scope to do as he pleases in an urban and industrial world, the changes have made the

> value served by the Fourth Amendment more, not less, important.

Coolidge, 403 U.S. at 455. (Footnotes omitted). In the case at bar, there was no showing that it was "imperative" for Officer Nelson to search the stereo components. No exigency existed. The fundamental concept that a person has a right to be secure in his home is the most basic right. James Hicks had that right, even though he lived in a rundown "low-rent" apartment.

No matter now much credence the State of Arizona puts in *Texas* v. *Brown* and the language which indicated that the term "immediately apparent" was a poor choice of words, it cannot avoid the reasonableness of the *Brown* search based on *Coolidge*. This Court found it was reasonable to search and seize balloons when probable cause existed to "associate the property with criminal activity." (*Id.* 460 U.S. at 742). Where was probable cause in this case? There was none.

Mere suspicion or a hunch is insufficient for Fourth Amendment purposes but even more grievous is the concept that a man's economic status is grounds for a search. Respondent feels a "status" search, which seems to be condoned by the Petitioner, has no place in Fourth Amendment law. Because a person is poor does not mean he is a thief. Just because a poor man has a nice stereo does not mean he stole it. The police have no right to search the house of a man who makes little money just as they have no right to search a millionair's mansion. To justify a search based on the presumption a person cannot afford items of property is not probable cause, is not reasonable suspicion and is not to be condoned.

For this Court to permit police to avoid a warrant when in a ghetto apartment but to require one in a penthouse

suite strikes at the core of a citizens' Fourteenth Amendment right to be secure in his "life, liberty or property" and to the "equal protection of the laws." A search based on a hunch is not good police work. It is guess work which has no basis. If all a police officer needs is a hunch to search, there would be no need for warrants.

In summation, Officer Nelson, without basis, conducted a general search of James Hicks' apartment. This search occurred well after grounds for being in the apartment disappeared. His excuse for rummaging about in another's personal effects was that the occupant was poor and could not afford such nice things. He made no effort to get a search warrant because he knew he could not get one. Under all the circumstances, this search was unreasonable. The fact that his hunch, in retrospect, proved accurate, does not make his initial action any more reasonable.

III

EXCLUSION OF THE ITEMS WAS THE APPROPRIATE SANCTION.

Petitioner concludes its argument by asking this Court to sanction the illegal search under its recent case of *United States* v. *Leon*, 468 U.S. ___, 104 S.Ct. 3405 (1984). However, as Judge Livermore, of the Arizona Court of Appeals, noted in his opinion:

> Police officers cannot launder their prior unconstitutional behavior by presenting the fruits of it to a magistrate.

State v. *Hicks*, 146 Ariz. 533 at 535, 707 P.2d 331 at 333 (App. 1985).

Leon is not on point in as much as it is a search warrant case. This Court's holding was aimed at a police officer's

objectively good faith reliance on a warrant obtained from a judge or magistrate. Officer Nelson did not try to get a warrant. Instead, he proceeded on his own. Contrary to Petitioner, Respondent expects the exclusion of this evidence based on Nelson's misconduct to deter his future acts as well as those of others. As this Court stated in *Leon:*

> The good-faith exception for searches conducted pursuant to warrants is not intended to signal our unwillingness strictly to enforce the requirements of the Fourth Amendment, and we do not believe that it will have this effect.

Id. 468 U.S. ___, 104 S.Ct. at 3422. *Leon* does not detract from the protections of the Fourth Amendment and the trial court here showed that this principle will be enforced.

Additionally, *Leon* certainly does not stand for the proposition that police may justify illegal conduct by presenting truthful information to a magistrate in order to obtain a valid search warrant, where the information they have obtained was obtained in a illegal manner. In *Leon*, this Court stated that in a search:

> . . . suppression is appropriate if the officers were dishonest or reckless in preparing their affidavit *or could not have harbored an objectively reasonable belief in the existance of probable cause.*

Id., 468 U.S. ___, 104 S.Ct. at 3423. (Emphasis added). There was no objectively reasonable belief in the existance of probable cause for the search conducted by Officer Nelson of the stereo components.

CONCLUSION

The intrusion, in the case at bar, violated the Respondent's Fourth Amendment rights. Therefore, the order of

the trial court supressing the use of the stereo unit as evidence was correct. By condoning Officer Nelson's conduct this court would be sanctioning a significant erosion of the Fourth Amendment of the United States Constitution. The "minimal intrusion" Petitioner would have this Court believe occurred on April 28, 1984, was, in fact, the type of action the Fourth Amendment proscribes. If this conduct can not be considered a general search without a warrant, no conduct can. Respondent contends the serial numbers of the stereo were not in plain view, the officer had no right to inspect them more closely, and that when he handled the object, he began an unreasonable search and seizure which was illegal.

Twenty-five years ago, in *Mapp* v. *Ohio*, 367 U.S. 643 (1961) this Court reiterated the profound statement made in *Boyd* v. *United States*, 116 U.S. 616, (1886) wherein the court held the doctrines of the Fourth and Fifth Amendments

> 'apply to all invasions on the part of the government and its employes of the sanctity of a man's home and the privacies of life. It is not the breaking of his doors, and the rummaging of his drawers, that consitutes the essence of the offence; but it is the invasion of his indefeasible right of personal security, personal liberty and private property * * *. Breaking into a house and opening boxes and drawers are circumstances of aggravation; but any forcible and compulsory extortion of a man's own testimony or of his private papers to be used as evidence to convict him of crime or to forfeit his goods, is within the condemnation * * * [of those Amendments].'
>
> * * *
>
> '. . . constitutional provisions for the security of person and property should be liberally construed. * * It is the duty of courts to be watchful for the constitu-

> tional rights of the citizen, and against any stealthy encroachments thereon.'

Mapp v. *Ohio*, 367 U.S. at 646 and 647.

Society's belief that people should be secure in their persons, places and effects, a fundamental concept of a free people, should not be so eroded as to allow police agencies free rein once legally inside an individual's home. The judgment of the trial court and the opinion of the appellate court should be affirmed.

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BRIEF

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No. 85-1027

In The

Supreme Court of the United States

October Term, 1985

STATE OF ARIZONA,

Petitioner,

vs.

JAMES THOMAS HICKS,

Respondent.

ON WRIT OF CERTIORARI TO THE ARIZONA COURT OF APPEALS

PETITIONER'S REPLY TO RESPONDENT'S BRIEF ON THE MERITS

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ARGUMENT

I. RECORDING SERIAL NUMBERS FROM A STEREO UNIT IN PLAIN VIEW DOES NOT IMPLICATE A FOURTH AMENDMENT INTEREST.

A. The inspection of the stereo unit to locate the serial number was not a search.

Respondent Hicks maintains that because the serial numbers on his stereo unit were not visible without turning the stereo that this is not a "plain view" case. Respondent ignores the threshold issue. The threshold issue is whether Fourth Amendment interests of privacy and possession are implicated at all.

Petitioner's argument first and foremost is that no Fourth Amendment interest is implicated because there has been no infringement of a legitimate expectation of privacy. Once Officer Nelson was legitimately inside the apartment, the benign observation of the stereo unit, an object in plain view, reduced Hicks' Fourth Amendment interests in the stereo to that of possession and ownership, regardless of whether the serial numbers on the exterior of the stereo were visible.

It was the suspicious stereo unit, not its number, that drew Officer Nelson's attention. It was the stereo that was out of context with its surroundings. It was the stereo that Officer Nelson knew, all too often, was frequently stolen. The stereo is the item of evidence respondent sought to have suppressed, but, placed in plain view in his living room for anyone to see who entered the room. The focus, and therefore, the expectation of privacy, if there is one, attaches to the object, not its identifying number. The number is simply the means by which the object, already in plain view, could be and was identified.

Petitioner submits that if there is a legitimate expectation of privacy in the object that society is prepared to recognize, this does not create a separate interest in the serial number on an item of personalty that is distinguishable from the object. Once the item of personalty comes within the purview of officers lawfully present,[1] the Fourth Amendment should not extend to create a right of privacy in the number when it no longer exists in the object.

Respondent cites *California v. Ciraolo,* — U.S. —, 106 S.Ct. 1809 (1986) as a reaffirmation by this Court that:

> [t]he touchstone of Fourth Amendment analysis is whether a person has a constitutionally protected reasonable expectation of privacy.

106 S.Ct. at 1811.

Reasonable expectations are, however, gaged in the final analysis in terms of whether society is willing to recognize the expectation as reasonable. *Katz v. United States,* 389 U.S. 347, 360 (1967).

Society recognizes no reasonable expectation of privacy of a thief in stolen property. The thief has no more or less privacy in the serial number identifying the stolen property than he does in the property itself. An inspec-

1. Amicus Curiae, American Civil Liberties Union Foundation, emphasizes the strong privacy interests associated with the home. Petitioner submits, however, that the justifiable presence of officers in Hicks' apartment resolved any privacy interest that Hicks had to objects in "plain view" within his apartment. The observation of the stereo unit herein should therefore be considered in the same light as any other observation from a vantage point where the officer has a right to be.

tion of the object to obtain the serial number, if limited to the stolen object, does not therefore infringe a legitimate privacy interest. As a result, the computer check of the serial number on the stolen article for the sole purpose of identifying it as stolen does not infringe on a reasonable expectation of privacy.

In *United States v. Jacobsen,* 466 U.S. 109 (1984), this Court held that a "search" within the meaning of the Fourth Amendment occurs only when an expectation of privacy that society is prepared to consider reasonable is infringed. There, employees of a private freight carrier, in the course of examining a damaged package, observed a white powdery substance, originally concealed with eight layers of wrappings. The freight carrier's employees summoned a federal agent, who, without a warrant, removed a trace of the powder, subjected it to a chemical test and determined that it was cocaine. This Court found that while the Drug Enforcement Agent's field test exceeded the scope of the private search, it was not an unlawful "search" or "seizure" within the meaning of the Fourth Amendment. Government conduct that can only reveal whether a substance is cocaine, and no other "private" fact, compromises no *legitimate* privacy interest. Similarly, in the case at bar, government conduct that can reveal exclusively whether an item of personalty is stolen, and no other "private" fact compromises no *legitimate* privacy interest.

Respondent argues that petitioner's position that no privacy interests are retained in the serial number "flies in the face" of the *warrant* clause. Respondent is plainly wrong. It is the portion of the Fourth Amendment that

secures the right of the people to be free from unreasonable searches, not the warrant clause, that creates the privacy interest.

The Fourth Amendment protects the right of the people to be free from *unreasonable* searches and seizures, and requires the existence of probable cause before a warrant may issue. *Texas v. Brown*, 460 U.S. 730, 735 (1983). It does not require the existence of probable cause to search if there is no legitimate expectation of privacy. *United States v. Jacobsen*, 466 U.S. 109 (1984). Moreover, this Court has routinely recognized flexible, common-sense exceptions to the warrant requirement in a wide range of diverse situations, including exigent circumstances, hot pursuit, automobile searches, search incident to arrest, and search at the border. *See Texas v. Brown*, 460 U.S. at 735-36, and cases cited therein. Additionally, this Court has upheld intrusions less severe than full-scale searches or seizures without the necessity of a warrant, for example, stop and frisk, seizure for questioning, and roadblocks. The "plain view" doctrine is simply another exception within the former category. *Id.* The Fourth Amendment creates no additional rights to privacy under the Warrant Clause.

B. Recording serial numbers does not constitute a seizure.

Respondent contends that the act of lifting and turning the stereo component was as much a seizure as writing down the numbers. Respondent's contentions, however, ignore this Court's decisions defining "seizure." This Court has stated:

> [a] "seizure" of property occurs when there is some meaningful interference with an individual's possessory interest in that property.

United States v. Jacobsen, 466 U.S. 109, 113 (1984). In the case at bar, Officer Nelson's observations did not interfere with Hicks' possessory interest in the serial number. The identification number was not separated from the stereo unit, nor was the stereo itself taken until it was determined to have been stolen. By merely observing the serial number on the stereo unit, Officer Nelson did not dispossess Hicks of his stereo or meaningfully interfere with Hicks' possessory interest in the stereo. Thus, there was no Fourth Amendment "seizure."

II. ASSUMING ARGUENDO THAT FOURTH AMENDMENT INTERESTS ARE IMPLICATED IN THE RECORDING OF SERIAL NUMBERS FROM THE STEREO UNIT, THE FOURTH AMENDMENT PROHIBITS ONLY UNREASONABLE SEARCHES AND SEIZURES.

A. An officer performing a lawful search may conduct a closer inspection of the item in plain view.

Respondent maintains that in order to inspect an item in plain view, the object must be obviously either contraband or evidence of a crime. Respondent apparently concedes, however, that if it is "immediately apparent" that an item of personalty is stolen, the item may not only be examined more closely, but may also be seized as evidence of a crime.

In *Coolidge v. New Hampshire*, 403 U.S. 443 (1971), this Court announced a plain view exception to the warrant requirement, permitting seizure when:

(1) the police have a prior justification for the intrusion;

(2) when the discovery of the evidence is inadvertent; and

(3) the incriminating character of the object is "immediately apparent."

There is no question that the first prong of the *Coolidge* test has been met, and respondent does not contend otherwise.

As for the second prong of the *Coolidge* test, the facts clearly demonstrate that it has been met. Phoenix Police Officers entered Hicks' apartment to investigate a shooting. They were looking for other injured parties, the assailant, and his weapon. There is nothing in the record to suggest that officers had any idea that they would find evidence of an armed robbery.

The critical question presented here is to what extent reasonable suspicion will justify Officer Nelson's inspection of the stereo to satisfy the third prong of *Coolidge*.

Petitioner maintains that respondent, like the trial court herein, has taken the phrase "immediately apparent" to imply an unduly high degree of certainty as to the incriminatory character of the evidence necessary for application of the "plain view" doctrine. *See Texas v. Brown*, 460 U.S. at 741.

> The evidence must be seen and weighed not in terms of library analysis by scholars, but as understood by those versed in the field of law enforcement.

Id. at 742, citing *United States v. Cortez*, 449 U.S. 411, 418 (1981). A trained law enforcement officer should be able to examine a suspicious object if he has a "reasonable suspicion" to believe that the discovered item is evidence.

Such examination and inspection does not contravene any Fourth Amendment principle but, in fact, complies with the reasonableness standard which is the principal basis for all searches and seizures under the Fourth Amendment.

B. A warrantless seizure of property on the basis of reasonable suspicion that the property is stolen is not a violation of the Fourth Amendment.

Respondent asserts that petitioner advocates a new exception to the Warrant Clause that would allow "mere suspicion" to replace probable cause as the standard for a search. This simply is not true. It is petitioner's contention that an officer may reasonably investigate a suspicious item of personalty under that portion of the Fourth Amendment that permits by inference reasonable searches. This issue does not directly concern the Warrant Clause. An extension of the principles announced in *Terry v. Ohio*, 392 U.S. 1 (1968), to permit investigative seizure of personal property on the basis of reasonable, articulable suspicion, premised on objective facts that the property is evidence of a crime, will not supplant the warrant requirement.

Beginning with *United States v. Place*, 462 U.S. 696 (1983), and continuing through *New York v. Class*, — U.S. —, 106 S.Ct. 960 (1986), this Court has balanced law enforcement interests justifying the intrusion against the impact on any protected property interest. In each case, this Court has found that the brief detention was so minimally intrusive of Fourth Amendment interests that the strong countervailing governmental interest justified the seizure based only on specific articulable facts that the

property contained contraband or evidence of a crime. This case is but a logical extension of these previously announced principles.

For example, in *United States v. Place*, this Court applied *Terry* principles to permit investigative seizures of personal property on the basis of reasonable, articulable suspicion, premised on objective facts that the property (luggage) contained contraband or evidence of a crime. The Court balanced the law enforcement interest (preventing the flow of narcotics into distribution channels) against the nature and extent of the intrusion (brief detention of luggage to expose it to a narcotics detection dog). It concluded that:

> When an officer's observations lead him reasonably to believe that a traveler is carrying luggage that contains narcotics, the principles of *Terry* and its progeny would permit the officer to detain the luggage briefly to investigate the circumstances that aroused his suspicion, provided that the investigative detention is properly limited in scope.

462 U.S. at 706.

In the case at bar, *Terry* principles can be applied, as in *United States v. Place*, to permit the officer to briefly investigate the circumstances that aroused his suspicion without violating any aspect of the Fourth Amendment.

The intrusion herein is so brief and limited that any conceivable breach of privacy or possession could only have a *de minimus* impact on the protected interest. The inspection of the stereo unit to ascertain the serial number in an effort to confirm suspicion that the stereo was stolen infringes upon no personal and societal value protected by the Fourth Amendment.

III. THE SANCTION OF EXCLUSION IS INAPPROPRIATE WHERE THERE IS OBJECTIVELY REASONABLE LAW ENFORCEMENT ACTIVITY.

Respondent maintains that *United States v. Leon*, 468 U.S. 897 (1984) is not on point because this is not a "search warrant" case. He misunderstands petitioner's argument. Petitioner has cited *Leon* for the premise that society has no interest in deterring objectively reasonable police conduct.

The exclusionary rule has never been interpreted to proscribe the use of illegally seized evidence in all proceedings or against all persons. This Court has recognized that the application of the rule should be restricted to those areas where its remedial objectives are best served. Officer Nelson, relying on his experience, objectively and reasonably assessed the facts available to him and concluded that the information warranted further investigation. This conduct does not warrant punishment. Officers have a duty and responsibility to investigate suspected stolen property, and should be encouraged to do so.

As this Court recognized in *United States v. Leon*, 468 U.S. at 907-08:

> "Our cases have consistently recognized that unbending application of the exclusionary sanction to enforce ideals of governmental rectitude would impede unacceptably the truth-finding functions of judge and jury." An objectionable collateral consequence of this interference with the criminal justice system's truth-finding function is that some guilty defendants may go free or receive reduced sentences as a result of favorable plea bargains. Particularly when law enforcement officers have acted in objective good faith

> or their transgressions have been minor, the magnitude of the benefit conferred on such guilty defendants offends basic concepts of the criminal justice system.
>
> (Citations and footnote omitted.)

In the case at bar, the evidence thus suppressed prohibits the State of Arizona from prosecuting Hicks for the armed robbery and kidnapping that occurred at the Jandrlich home on March 29, 1984, despite the fact that the stereo equipment taken from the Jandrlich's home was found in Hicks' apartment and Hicks' fingerprint[2] was found in the Jandrlich's home. Without question, as this Court has recognized: "the magnitude of the benefit conferred on such guilty defendants offends basic concepts of the criminal justice system." *Id.*

Here, the nature and extent of the intrusion (slight movement of stereo) must be considered in light of Hicks' privacy and possessory interest (a stolen stereo unit located in "plain view" of anyone entering his apartment) against the governmental interest (investigating criminal activity). Suppression of all relevant evidence, resulting from such a minimal intrusion is too high a price for society to pay.

———o———

2. The Maricopa County Superior Court suppressed the fingerprint as fruit of the poisonous tree pursuant to *Wong Sun v. United States*, 371 U.S. 471 (1963) inasmuch as it was derived from the identification made after police realized the Jandrlich stereo had been found in Hicks' apartment.

CONCLUSION

The judgment of the trial court suppressing the stereo unit was erroneous. Neither the moving of the stereo unit nor the recording of its identifying numbers implicated a Fourth Amendment interest. However, even if a Fourth Amendment interest is involved, Officer Nelson's actions did not violate the Fourth Amendment's proscription against "unreasonable" searches and seizures. Officer Nelson was entitled to inspect the stereo and indeed had a duty to investigate facts giving rise to a reasonable suspicion of criminal activity. If as a result of his investigation there was probable cause to believe that the stereo was stolen, Officer Nelson had the duty to seize it. There is no measurable societal benefit to be served by proscribing and punishing this minimal intrusion that would justify the cost of letting an armed robber and kidnapper go free. The judgment of the trial court should be reversed.

Respectfully submitted,

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AMICUS CURIAE

BRIEF

MOTION FILED

MAY 20 1986

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~~No.~~ 1027

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

STATE OF ARIZONA,

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ON WRIT OF CERTIORARI TO THE
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MOTION FOR LEAVE TO FILE BRIEF AND BRIEF AMICI CURIAE OF AMERICANS FOR EFFECTIVE LAW ENFORCEMENT, INC. JOINED BY THE INTERNATIONAL ASSOCIATION OF CHIEFS OF POLICE, INC., THE LEGAL FOUNDATION OF AMERICA, AND THE NATIONAL DISTRICT ATTORNEYS ASSOCIATION, INC., IN SUPPORT OF THE PETITIONER

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MOTION FOR LEAVE OF AMICI CURIAE TO FILE BRIEF

Come now **Americans for Effective Law Enforcement, Inc.**, *et al.*, and move this Court for leave to file and join the attached brief as *amici curiae*, and declare as follows:

1. *Identity and Interest of Amici Curiae.* The *amici curiae* are described as follows:

Americans for Effective Law Enforcement, Inc. (AELE), as a national not-for-profit citizens organization, is interested in establishing a body of law making the police effort more effective, in a constitutional manner. It seeks to improve the operation of the police function to protect our citizens in their life, liberties and property, within the framework of the various State and Federal Constitutions.

AELE has previously appeared as *amicus curiae* seventy-two times in the Supreme Court of the United States, and thirty-six times in other courts, including the Federal District Courts, the Circuit Courts of Appeal and various state courts, such as the Supreme Courts of California, Illinois, Ohio and Missouri.

The International Association of Chiefs of Police, Inc. (IACP), is the largest organization of police executives and line officers in the world, consisting of more than 12,600 members in 62 nations. Through its programs of training, publications, legislative reform, and *amicus curiae* advocacy, it seeks to make the delivery of vital police services more effective, while at the same time protecting the rights of all our citizens.

The Legal Foundation of America (LFA), is a nonprofit corporation supporting the operations of a public interest law firm. Among other goals, it seeks to preserve a rational criminal justice system, in which adjudications of guilt or innocence are reliable rather than haphazard. The Foundation's attorneys have previously appeared as *amicus curiae* in this Court to urge this view. All litigation undertaken by the Foundation is approved by its Board of Trustees, the majority of whom are attorneys. LFA does not accept private fees and is supported by grants from the public.

The National District Attorneys Association, Inc. (NDAA) is a nonprofit corporation and the sole national

organization representing state and local prosecuting attorneys in America. Since its founding in 1950, NDAA's programs of education, training, publication, and *amicus curiae* activity have carried out its guiding purpose of reforming the criminal justice system for the benefit of all of our citizens.

2. *Desirability of an Amici Curiae Brief.* *Amici* are professional associations representing the interests of law enforcement agencies at the state and local levels. Our members include: (1) law enforcement officers and law enforcement administrators who are charged with the responsibility of obtaining and executing arrest and search warrants, making warrantless arrests and searches, as well as investigating reports of crimes on and off premises, and (2) prosecutors, county counsel and police legal advisors who, in their criminal jurisdiction capacity, are called upon to advise law enforcement officers and administrators in connection with such matters, and to prosecute cases involving evidence obtained thereby.

Because of the relationship with our members, and the composition of our membership and directors—including active law enforcement administrators and counsel—we possess direct knowledge of the impact of the ruling of the court below, and we wish to impart that knowledge to this Court. We respectfully ask this Court to consider this information in reaching its decision in this case.

3. *Reasons for Believing that Existing Briefs May Not Present All Issues.* AELE, IACP, LFA, and NDAA are national associations, and their perspective is nationwide. This brief concentrates on policy issues, including the values served by the adoption of "bright line" rules for guiding police conduct in the law of search and seizure. Although Petitioner is clearly represented by capable and diligent counsel, no single party can completely develop all relevant views of such issues as these.

4. *Avoidance of Duplication.* Counsel for *amici curiae* has reviewed the Petition for Certiorari and has conferred at length

with counsel for Petitioner in an effort to avoid unnecessary duplication. It is believed that this brief presents issues that are not otherwise raised.

5. *Consent of Parties or Requests Therefor.* Counsel has requested consent of all parties. The Consent of Petitioner has been received, and the consent has been filed with the clerk of this Court. This Motion is necessary because counsel for Respondent has declined to grant consent to the *amici.*

For these reasons, the *amici curiae* request that they be granted leave to file the attached *amici curiae* brief.

Respectfully submitted,

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ARGUMENT

THIS COURT SHOULD ADOPT A BRIGHT LINE RULE THAT WHEN POLICE OFFICERS ARE IN A PLACE WHERE THEY HAVE A RIGHT TO BE AND THEY INADVERTENTLY SEE AN OBJECT AS TO WHICH THEY HAVE A REASONABLE SUSPICION IS EVIDENCE OF A CRIME, THEY CAN CONDUCT A CURSORY, NON-OBTRUSIVE INSPECTION OR SEARCH OF THE OBJECT TO DETERMINE ITS TRUE NATURE.

The Court below, *State* v. *Hicks,* 146 Ariz. 533, 707 P.2d 331 (1985), ruled that police officers, who properly made an emergency entry of the defendant's apartment in response to a report of a shooting, exceeded the scope of a permissible search by moving stereo components, which they believed to be stolen, in order to locate and record the serial numbers, which information was then used to confirm the officers' suspicions and to obtain a search warrant.

Amici will not duplicate the case law analysis of the Petitioner State of Arizona in this case, although we agree with that analysis. Instead, we will concentrate upon a policy issue raised by this case—our need as law enforcement administrators to ensure that law enforcement officers have sufficient guidance in the area of Fourth Amendment jurisprudence raised by this case.

Amici, with our close association with the police community, know that police officers enter private homes for a variety of lawful reasons—*e.g.,* to serve a warrant, to answer a call of distress, to take a routine report, or to render another service. At such times police officers may observe objects that they reasonably suspect to be stolen, or they may observe items they reasonably suspect to be contraband, instrumentalities, or fruits of a crime.

This Court has previously acknowledged that due weight is to be placed upon the articulable suspicions of trained and experienced police officers. *Terry* v. *Ohio,* 392 U.S. 1, 88 S.Ct. 1868 (1968). A police officer's observations of things which appear to be unusual, in light of his experience, may suggest the possibility of criminal conduct. As law enforcement administrators, we submit that an officer would be derelict in his duties not to act upon indicia that his experience and expertise reveals as possible criminal behavior; and, indeed, such an officer might be subject to discipline by his superiors for a *failure* to investigate such circumstances.

Amici urge this Court to adopt a "bright line" rule which would allow a police officer to examine the *exterior* of various items he might see or encounter while lawfully entering or searching a private home or business, and to record the serial numbers of items he *reasonably* suspects to be stolen. This may be a "search" under the Fourth Amendment, but not a "seizure." As a "search" it would be reasonable under the Fourth Amendment because of its unobtrusive nature. *New York* v. *Class,* ____ U.S. ____, 106 S.Ct. 960 (1986). The "search" would be cursory and momentary and would not involve a "detention" or "seizure" of the items observed. *Cf., United States* v. *Place,* 462 U.S. 696, 103 S.Ct. 2637 (1983).

In adopting a "bright line" rule for the police in this area of Fourth Amendment jurisprudence, as the Court did in *New York* v. *Belton,* 453 U.S. 454, 101 S.Ct. 2860 (1981), and *United States* v. *Ross,* 456 U.S. 798, 102 S.Ct. 2157 (1982), the Court would, in effect, give clear guidance to the police and at the same time would *control* police discretion.

The rule we argue for would be limited: the police could only inspect, photograph, move, or turn over the object that is the focus of their reasonable suspicion. They could not open it, remove a door or panel, or take it apart. Their inspection, or "search," must be truly "cursory" and "unobtrusive." We

believe that the Court can adequately tailor such a "bright line" rule to (1) protect defendants' Fourth Amendment rights, (2) give clear guidance to the police, and (3) control police discretion, as was accomplished by *Belton* and *Ross.*

To hold otherwise would impede conscientious police officers from using their training and experience in making judgments, and would result in a judicial blindfold upon their eyes.

Conversely, *amici* realize that a police officer's unfounded hunch, an unsupported intuition, or an overzealous imagination, could result in an illegal inspection of personal belongings. The litmus test must be the *reasonableness* of the officer's suspicions, *predicated on specific and articulable facts and circumstances,* which persuade a reasonably-trained and experienced officer to suspect the item or goods are stolen (or otherwise are subject to seizure). As law enforcement administrators, *amici* are as interested in channelling law enforcement discretion into constitutionally acceptable conduct as are the parties in this case and, indeed, this Court. We submit that the application of the "reasonable suspicion" standard to a "cursory, unobtrusive" inspection or "search" would balance all interests in a constitutional manner.

Turning to the instant case, we believe the record provides a sufficient basis for judging whether the police officer possessed a reasonable and articulable suspicion that the stereo equipment was stolen. It is clear that the sighting of expensive stereo equipment in what could only be described as a sea of refuse, drug paraphernalia and alcoholic containers, constituted "reasonable suspicion" that the item had been stolen. To conclude otherwise would be to ignore Officer Nelson's twelve years of training and experience. Such a result would call into question the value of police training and experience in making reasonable suspicion and probable cause determinations. *Amici* would be naive to instruct law enforcement officers that this result is compelled by the Fourth Amendment.

It is equally clear that the officer's inspection of the object was "cursory" and "unobtrusive." The record reflects that he moved it or turned it around. *Amici* submit that even turning an object upside down would be a "reasonable" search. The anomaly of holding otherwise would be aptly demonstrated in a case where an officer could as easily use a mirror or a flashlight to bring the serial numbers into view. *Texas* v. *Brown,* 460 U.S. 730, 103 S.Ct. 1535 (1983). Moving, turning the object, or turning it upside down, involves no invasion of a reasonable expectation of privacy of the owner of the object. We additionally submit that the officer's conduct in this case, viewed in the "totality of the circumstances," amply demonstrates the existence of objective reasonableness that should invoke the good faith exception to the exclusionary rule. *United States* v. *Leon,* 468 U.S. ____, 104 S.Ct. 3405 (1984).

CONCLUSION

Amici respectfully request this Court to continue its process of adopting bright line guidance for the police in Fourth Amendment jurisprudence, and urge that the decision of the court below should be reversed on the basis of law and sound judicial policy.

Respectfully submitted.

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AMICUS CURIAE

BRIEF

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

STATE OF ARIZONA,

Petitioner,

—v.—

JAMES THOMAS HICKS,

Respondent.

ON WRIT OF CERTIORARI TO THE ARIZONA COURT OF APPEALS

BRIEF AMICUS CURIAE OF AMERICAN CIVIL LIBERTIES UNION FOUNDATION IN SUPPORT OF RESPONDENT

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INTEREST OF AMICUS CURIAE[1]

The American Civil Liberties Union Foundation ("ACLU") is a national organization comprised of more than 250,000 members. The ACLU and its affiliates traditionally have been devoted to the protection and enhancement of fundamental liberties and basic civil rights.

STATEMENT OF THE CASE

On April 18, 1984, police officers responded to a radio call reporting a shooting at a Phoenix, Arizona apartment complex. (Jt. Appendix at 13-14). The shot was found to have originated in a "relatively small" two-bedroom apartment leased to respondent, James Hicks. (Id. at 22). A number of officers thereupon entered the

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[1] Letters from the parties consenting to the filing of this brief amicus curiae have been filed with the Clerk of the Court.

apartment searching for the weapon used in the shooting, for the person who fired the shot, and for possible victims. (Id. at 15). Eventually six officers engaged in a search that lasted about one hour. (Id. at 15-22). The initial search turned up a weapon. (Id. at 16).

After the apartment was secured, and the police had determined that no one was in it, an additional officer, Officer Nelson, entered the apartment and joined in the continuing search for weapons. (Jt. Appendix at 21). During this search virtually every conceivable part of the apartment was inspected, including closets, dresser drawers, bed mattresses, a crawl space in a closet, and even the refrigerator. (Id. at 21-22). As a result of this thorough and detailed search, two additional weapons were discovered. (Id. at 16).

At the end of this hour-long search, the weapons were collected and their serial numbers copied. As Officer Nelson was preparing to run a telephone check on the serial numbers of the weapons, he turned his attention to two stereo systems he had previously noticed in the apartment, one set up in normal operating fashion in the living room, the other set up in a bedroom. He decided to run a similar check on their serial numbers, too. (Jt. Appendix at 16).

According to his subsequent testimony, Officer Nelson's decision to investigate the stereo was an off-handed one. As Officer Nelson testified at the suppression hearing:

> I was going to check the serial numbers on the guns. So then I said, well, as long as I am checking serial numbers, I may as well check the serial numbers on the stereo items too. Jt. Appendix at 22.

First, however, he had to obtain the stereo set numbers, and in order to record the

serial number of the turntable in the living room, Officer Nelson had to turn it around or upside down -- to lift and manipulate the stereo in some fashion -- so that he could see the serial number, which was located on the back, or on the bottom, of the unit. (Jt. Appendix at 19).[2] So far as the record shows, his manipulation of the two stereo sets, and their various components, was a general one: two stereo systems, each comprised of several components, were involved; all were set up in operating fashion; and there is no suggestion that any of the serial numbers was immediately apparent to the casual household visitor.

Officer Nelson testified at the suppression hearing that, prior to running the check on the turntable's serial number,

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[2] Specifically, the officer later testified, he either "had to turn [the record turntable] around or turn it upside down" to view the serial number (Jt. Appendix at 19).

he had no particular or specific reason to believe that any of the stereo components he examined were in fact stolen (Jt. Appendix at 23). There is no suggestion that he had any particular report of stolen stereos in mind. In fact, he testified at the suppression hearing that it was merely because the stereos seemed to be "items of value" that he decided to copy down the serial numbers. He specifically disavowed any particular knowledge, based on personal experience or expertise, that the component later found to have been stolen -- or, indeed, any of the several components that he checked -- actually was unusually expensive or valuable. Rather, his sense was merely that the stereos were, in his judgment, a bit incongruous, given the low-rent nature of the apartment they were in. (Id. at 28-29).

A computer check of the stereo serial numbers revealed that one of the several

stereo components, a turntable, had in fact been reported stolen. (Jt. Appendix at 17). Based on Officer Nelson's findings, a search warrant for Mr. Hick's apartment was issued. As a result of items seized pursuant to the warrant, Mr. Hicks was indicted on charges of Armed Robbery and Kidnapping. His subsequent Motion to Suppress was granted by the trial court, on the ground that the stereo and all evidence "discovered after the 'search' concerning the turntable were the results of an unlawful search." (Id. at 37).

The Arizona Court of Appeals affirmed that judgment and the Arizona Supreme Court denied review.

SUMMARY OF ARGUMENT

This case concerns police interference with the quiet enjoyment of personal effects located in a private home. In the absence of a warrant, and probable cause, this police

intrusion cannot be squared with long-established Fourth Amendment principles.

This case provides no occasion for modification of the "plain view" doctrine so as to permit warrantless searches in the home based on less than probable cause. That doctrine, in its present form, accurately reflects basic Fourth Amendment principles, and adequately adapts those principles to reasonable law enforcement needs. In any event, modifying the "plain view" doctrine on the facts presented here -- an in-home search of personal effects based on a mere law enforcement "hunch" -- would represent a wholly impermissible, wholesale weakening of the probable cause standard embodied in the Fourth Amendment.

There is no question that application of the exclusionary rule is the appropriate remedy for the unconstitutional police action at issue in this case.

ARGUMENT

I. THE SEARCH AND SEIZURE OF THE STEREO IN THIS CASE, WITHOUT A WARRANT OR PROBABLE CAUSE, CONTRAVENED THE FOURTH AMENDMENT.

Petitioner's initial contention is that Officer Nelson's manipulation of the stereo, and recording of its serial number, do not implicate Fourth Amendment interests. This argument is utterly without support in the prior rulings of this Court, and may be disposed of in short order. There is no question that Officer Nelson's actions clearly violated well-established Fourth Amendment principles.

A. The Close Inspection And Manipulation Of The Stereo To Reveal And Record Its Serial Number In Respondent's Home Clearly Implicate Core Fourth Amendment Interests.

For Fourth Amendment purposes, a search occurs whenever "an expectation that society is prepared to consider reasonable is

infringed." United States v. Jacobsen, 466 U.S. 109, 113 (1984). Although physical interference with property, or physical intrusions into private areas, are not the only interests that are constitutionally protected, cf. Katz v. United States, 389 U.S. 347 (1967), cases involving such intrusions are the clearest and most long-settled ones. This case falls squarely within these long-established Fourth Amendment rules.

Indeed, because the "sanctity of a man's home,"[3] lies "at the very core" of the values the Founding Fathers designed the Fourth Amendment to protect, Payton v. New York, 445 U.S. 573, 589-90 (1980), the search and seizure at issue here involves the "chief evil against which the wording of the Fourth Amendment is directed." United States v.

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[3] Boyd v. United States, 116 U.S. 616, 630 (1886).

United States District Court, 407 U.S. 297, 313 (1972). (emphasis added). Because an individual's expectation of privacy in the quiet enjoyment of personal effects located in his home is so central to the Fourth Amendment's purpose, the Court has long applied especially close Fourth Amendment scrutiny to all governmental intrusions into property that is kept there.[4] This special sensitivity toward the privacy of the home flows not merely from the text and history of the Fourth Amendment, United States v. United States District Court, supra; Payton v. New York, supra at 585-586 & n.25, but also from the continuing subjective and objective privacy expectations of life in our society today. And our normal, socially-accepted

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[4] C.f. Michigan v. Clifford, 464 U.S. 287, 296-97 (1984) ("We frequently have noted that privacy interests are especially strong in a private residence") (Powell, J.); Silverman v. United States, 365 U.S. 505, 511 (1961); Cf. Stanley v. Georgia, 394 U.S. 557 (1969).

expectation of privacy in our homes is, of course, a multi-layered and subtly nuanced one: inviting someone to come into our homes, absent a specific additional invitation, does not ordinarily imply consent to have every casual visitor -- friend, or neighbor, or door-to-door brush salesman -- also turn our stereo and television sets upside down and backwards, or go rummaging through our drawers. Compare United States v. Karo, 468 U.S. 705 (1984).

In arguing that no Fourth Amendment interests are implicated in this case, Pet. Br. at 9-16, petitioner effectively asserts that the justifiable presence of the police in Mr. Hicks' apartment following the reported shooting automatically destroyed any and all expectation of privacy he had in his personal effects, merely because some, or even all, of them could be superficially observed by someone lawfully coming through

his door. This "all or nothing" argument fails to recognize, however, that our society routinely recognizes and respects various degrees of expectations of privacy in the home -- even in the very same item at the very same time -- all of which are socially "reasonable". The fact that a portion of the stereo was visible to people entering his apartment does not destroy all privacy interests Mr. Hicks had regarding it, or diminish his right to the quiet enjoyment of it where it had been set up.[5]

It is well-established, as a matter of law, that even if the excusable entry by police, pursuant to exigent circumstances,

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[5] Indeed, even petitioner concedes that the opening of the stereo -- unscrewing panels and meddling with delicate electronic systems -- might raise constitutional issues. But the existence of even more meddlesome intrusions hardly excuses the unjustified intrusion that actually occured, and certainly is no argument for the idea that the less intrusive means Officer Nelson actually used somehow lack Fourth Amendment implications.

legitimately infringed Hicks' ordinary expectation not to have others enter his home absent his consent, a "partial invasion of privacy cannot automatically justify a total invasion." Walker v. United States, 447 U.S. 649, n.13 (1980). See also Mincey v. Arizona, 437 U.S. 385 (1978). Thus, even after the police legitimately entered his home, Mr. Hicks nonetheless still had a consitutionally protected partial expectation of privacy in his stereo, including an interest in its not-readily-apparent serial number. And he was legitimately entitled to believe that personal property in his apartment would not be subject to intense scrutiny and physical manipulation without proper (i.e., legally "probable") cause.

The Court's recent decision in New York v. Class, ___ U.S. ___, 54 U.S.L.W. 4178 (1986), which petitioner cites as though it supported his position, in fact only

confirms the validity of this analysis. If moving a few papers to see a Vehicle Identification Number ("VIN") that is required by public safety laws to exist and to be visible, in a moveable automobile voluntarily driven in a public place, constitutes a search, turning fragile stereo components upside down and backwards, following an uninvited, warrantless entry into a private home is only more obviously a Fourth Amendment "search" as well.[6]

[6] Moreover, unlike the VINs at issue in Class, there is nothing inherent in the serial numbers on stereos, applicances, and other household possessions that would suggest that those numbers are entitled to anything less than the high expectation of privacy otherwise accorded to personal effects located in a home. Unlike the VIN at issue in Class, serial numbers on household appliances are provided by manufacturers for their own commercial uses: for quality control, warranty and repair purposes, and monitoring of distributors, to name only a few. In contrast, the very reason for existence of VINs is the government's strong interest in public safety concerns "of the highest order." Class v. New York, ___ U.S. ___, 54 U.S.L.W. 4178, 4181 (1986). See also Delaware v. Prouse, 440 U.S. 648, 658 (1979). Serial numbers on mundane personal possessions are not required at all -- let alone subject to restrictions concerning their

(con't next page)

B. No Distinction Between "Searches" and "Seizures" Bears Upon The Proper Analysis Of This Case.

Although searches and seizures are sometimes analyzed as discrete subjects, in practice a search and seizure often occur as part of an integral series of events involving aspects of both. Texas v. Brown, 460 U.S. 730, 747-48 (1983) (Stevens, J., concurring). Here there is precisely such an increasingly intrusive series of events. The police conduct at issue here plainly intruded into possessory interests, as well as expectations of privacy, in a process of escalating constitutional violations.

size and visibility like those pertaining to automobile VINs. To the contrary, they are generally placed so as to be as unobtrusive as possible.

Citizens who operate automobiles on the open highway (or who buy similarly-regulated weapons) are presumptively aware of the routine law enforcement interest in such items. But neither intense government regulation nor routine government law enforcement interest exist with regard to household possessions, kept in the private home, such as the stereo component at issue here.

For Fourth Amendment purposes, a seizure of personal property occurs whenever there is "some meaningful interference with an individual's possessory interests in that property," United States v. Jacobsen, supra, 466 U.S. at 113, and neither specific legal property interests, nor technical trespass law, ultimately determine whether a seizure has occurred. Katz v. United States, supra at 352-53.

Several of the officers' actions in Mr. Hicks' home plainly interfered with his dominion over the stereo in a meaningful way. Most significantly, Officer Nelson -- whether his actions are called "searching" or "seizing" -- physically lifted the phonograph turntable up and turned it upside down in order to see the serial number. While he was doing so, and until the turntable was restored to its original position, it was not available to be used or moved, and the

possessors' dominion over it was undeniably infringed. Similarly, recording the serial number for a computer check against listings of reported stolen property was nothing but a further, intentional challenge of the apartment resident's apparent claim to ownership of the stereo; such a "seizure" of the serial numbers has no other purpose than to cloud and burden someone's claim of ownership. Indeed, the police procedures at issue here are precisely an assertion of a police right to risk permanent damage to a delicate electronic instrument -- the possibility for damaging a delicate turntable by turning it upside down is readily apparent -- without an owner's consent.

Thus, whether the Court focuses on picking up the instrument, or on writing down the serial number, there can be no doubt that the police actions at issue here implicate the Fourth Amendment's protections

against unlawful seizures and searches conducted without probable cause.

C. Neither "Exigent Circumstances" Nor "Plain View" Can Legitimate This Interference With Personal Effects Located In The Home.

It is a "cardinal principle" that warrantless searches and seizures are per se unreasonable under the Fourth Amendment--subject to only a few specifically estab-lished and well-delineated exceptions. Mincey v. Arizona, supra at 390. This principle is "axiomatic" and is of heightened intensity when the activity includes search and seizure taking place in one's home. Welsh v. Wisconsin, 466 U.S. 740, 748-49 (1984).

Therefore, the Court long ago decided that warrantless searchs and seizures, particularly those taking place in the privacy of the home, which are necessitated by unforseen emergencies "must be 'strictly

circumscribed by the exigencies which justify [an in-home intrusion at] its initiation. . . .'" Mincey v. Arizona, supra at 393. In this case, the investigative police activity at issue went far beyond the need presented by the exigency initially giving rise to it. It is therefore not surprising that petitioner's brief fails even to mention the long line of cases in this Court which have required special circumspection -- and carefully limited searches -- on the part of law enforcement officers who must make warrantless entries into private homes. See Warden v. Hayden, 387 U.S. 204 (1967); Chimel v. California, 395 U.S. 752 (1969); Michigan v. Tyler, 436 U.S. 499 (1978).

The initial exigency justifying entry into this apartment concerned a shooting, and nothing other than a shooting. It was in fact not even obvious at the outset (or

indeed, at any point, so far as the record shows) that the shooting was intentional or criminal, instead of merely accidental. Under such circumstances, the officers' legitimate response needed to be limited to the exigencies created by the shooting: searching for possible victims, or for suspects, or for guns. Here, at least six officers were involved in an extensive and thorough search of a "relatively small" apartment, (Jt. Appendix at 15, 22), designed to accomplish those goals.

This detailed search took approximately one hour (Jt. Appendix at 22), and included a search through closets (id. at 16), dresser drawers (id. at 21-22), a crawl space in a closet (id. at 21), and even the refrigerator (id. at 22). Before Officer Nelson arrived, the premises had been secured, and it was clear that neither victims nor suspects were to be found. Id. at 21. Officer Nelson

thereupon conducted a further careful search for weapons. And it was only after he and his fellow officers had completed their final, thorough search relating to the initial exigency that Officer Nelson turned his entirely separate investigative attention to the stereos. As he said at the suppression hearing,

> as soon as I entered in the living room area I noticed that there was a stereo set up along the east wall. But it was after I had been to the bedroom and found the guns that I decided to--I was going to check the serial numbers on the guns. So then I said, well, as along as I am checking serial numbers, I may as well check the serial numbers on the stereo items too. There was a stereo set in the living room area and also another stereo set in the northeast bedroom.

(Id. at 22).

In short, once he and his fellow officers had already looked into every nook and cranny of the dwelling, Officer Nelson had simply gotten into the habit of searching.

Forgetting all about the initial exigency, he decided that "as long as" he was looking at everything else in the apartment anyway, he "might as well" add some additional nearby serial numbers to his list, thus explicitly going "from one object to another until something incriminating" eventually emerged. Coolidge v. New Hampshire 403 U.S. 443, 466 (1971). Following the end of the exigency, and completion of the exigency-related search, he decided to conduct precisely the sort of additional "exploratory" search the Fourth Amendment and this Court's past "exigent circumstances" cases were intended to prevent.

Under these circumstances, petitioners cannot seriously contend that the exigencies justifying the officers' initial entry to investigate the shooting in any way authorized investigation of the stereo equipment. And given this Court's long,

clear line of cases concerning the need to circumscribe closely searches arising from "exigent circumstances" entries, Officer Nelson's subsequent focus of his investigative attention on these unrelated stereo components simply cannot be sustained.

Finally, petitioner itself concedes that, until the computer check "hit" on the turntable serial number, there was no probable cause to believe the stereo equipment in Mr. Hicks' apartment was connected with any crime or criminal activity. Recognizing that the absence of probable cause prior to Officer Nelson's inspection and manipulation of the several stereo components in the Hicks apartment defeats any claim that the "plain view" exception to the Fourth Amendment's warrant requirement, as currently applied and understood, Texas v. Brown, 460 U.S. 730, 744-746 (1983), (Powell, J. concurring), can

validate this search, both petitioner and amicus curiae International Association of Chiefs of Police, Inc. et al. argue that the "plain view" doctrine should be modified to justify the in-home search and seizure of personal property without probable cause. For the reasons set forth in the following section, revision of this standard is entirely unwarranted -- and especially so on the facts presented here.

II. MODIFICATION OF THE PROBABLE CAUSE STANDARD FOR "PLAIN VIEW" SEARCHES VIOLATES THE FOURTH AMENDMENT AND SOUND LAW ENFORCEMENT POLICY, AND IS NOT JUSTIFIED BY THE CIRCUMSTANCES OF THIS CASE.

A. The Probable Cause Standard For "Plain View" Searches Should Not Be Modified.

The history and rationale of the "plain view" doctrine make clear that the probable cause requirement has always been, and must

remain, an integral part of this closely and jealously guarded exception to Fourth Amendment warrant requirement. From the outset, the purpose of the "plain view" doctrine, as enunciated in Coolidge v. New Hampshire, 403 U.S. 443 (1971), was never to broaden police authority to conduct general searches in the absence of probable cause, but merely to rectify an anomaly created by Marron v. United States, 275 U.S. 192 (1927), which had barred the search and seizure of things the police had probable cause to believe were connected with criminal activity discovered during execution of a search warrant, but which were not described with particularity in the warrant itself. See 2 W. LaFave, Search and Seizure §4.11 at pp. 163-165 (1978).

The "plain view" exception was premised from the beginning on the idea that once a lawful search has begun,

> it would often be a needless inconvenience, and sometimes dangerous--to the evidence or to the police themselves--to require them to ignore it until they have obtained a warrant particularly describing it.

Coolidge, 403 U.S. at 467-468. (emphasis added).[7] In situations Coolidge was intended to address, therefore, there was no question whether police could obtain a warrant based upon probable cause, only whether they should be required to wait "until" one had been obtained. And, although a plurality opinion in Texas v. Brown, 460 U.S. 730 (1983), pointed out that the "plain view" holding of Coolidge was itself enunciated in a plurality

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[7] And Coolidge specifically presupposes, moreover, that it must be

> immediately apparent to the police that they have evidence before them; the 'plain view' doctrine may not be used to extend a general exploratory search from one object to another until something incriminating at last emerges.

Coolidge v. New Hampshire, supra at 466.

opinion, a clear majority of the Court has nonetheless only recently specifically reiterated the continuing vitality of the probable cause "plain view" standard. See Texas v. Brown, supra at 744-746 (Powell, J., concurring). Indeed, even those members of the Court who implied in a footnote to the plurality opinion in Texas v. Brown that they might condone a "plain view" search conducted on a lesser degree of suspicion than probable cause in an exceptional or unusual case specifically reaffirmed the probable cause standard in the "ordinary" one. Id. at 742, n.7.

The present case, of course, is plainly just an ordinary, garden variety "exigent circumstances" case, in which the police unjustifiably undertook an intrusive warrantless investigative inquiry into personal effects, inside a private home. Indeed, if there is anything extraordinary

about the "plain view" issue in this case, it is only that the intrusion in question occurred in a place, and with respect to objects, long entitled to unusually heightened Fourth Amendment protection. E.g., Michigan v. Tyler, supra; Michigan v. Clifford, 464 U.S. 287, 296-97 (1984); Payton v. New York, 445 U.S. 573, 589-90 (1980).

Amicus of course believes that the reasons previously set forth by the Court for applying the probable cause standard to all "plain view" searches remain as sound as ever, both in principle and in practice. No change in those principles is remotely justified. However, even if the Court desired to consider whether unusual circumstances might justify lowering the Coolidge "probable cause" standard in some rare or special circumstance, this still would not be the case with which to start.

To lower the standard for a warrantless search and seizure to "reasonable suspicion" in a case like this would in effect be to sanction a search and seizure on a lessened showing in all cases in which the "plain view" doctrine could even arguably be said to apply, because the facts of this case present one of the most direct intrusions possible into the "sanctity" of the home. Were petitioner's position to be upheld on the facts presented here, whenever an emergency caused an officer legally to enter a private home any item therein would necessarily become "fair game". And if personal effects in the private home are not protected from police inspection and manipulation by probable cause, it is difficult to say what else in our society would be. To apply a "reasonable suspicion" standard here would, in short, be a drastic and radical departure from accepted Fourth Amendment rules indeed.

Reassessing the Coolidge probable cause "plain view" standard on the facts presented here would, in addition, represent an extremely incautious approach to constitutional decision-making generally. To reach the issue that petitioner now presses, the Court would necessarily be leaping over any number of potential qualifications, limitations, and refinements (in-home vs. public place searches; inspection of visible surfaces as opposed to hidden ones; seizure of serial numbers that actually are visible to the naked eye, etc.),[8] which prudence would

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[8] Thus, if the Court were inclined to address the question of seizing serial numbers, for example, surely an instance might be found where the numbers at issue were actually in "plain" view, rather than hidden on the appliance's bottom or its back. This is not a case where the item searched or number seized is already in open view, and the contested seizure involves the use of no special augmented sensory devices to detect "latently" visible facts, Dow Chemical Co. v. United States, ___ U.S. ___, 106 S.Ct. 1819 (1986), or, as petitioner suggests, an officer with an especially good memory. It is a direct physical intrusion within the home.

recommend as intermediate stopping-points even for a partially revised "plain view" doctrine.

Indeed, even Texas v. Brown itself, which involved probable cause, specialized police expertise, and a moveable automobile in a public place, only considered "plain view" issues arising from police investigative actions -- the viewing officer's shifting of his own position to get a better view, and the shining of a flashlight -- that the Court expressly found could have just as easily, and just as lawfully, been done by an inquisitive civilian passerby. Texas v. Brown, supra at 740. The leap from authorizing a "reasonable suspicion" search in Brown -- something the Court, in any event, most emphatically did not do -- to authorizing one here would be a very great leap indeed.

B. Prior "Reasonable Suspicion" Holdings Of The Court Afford No Basis For The Wholesale Modification Of The "Probable Cause" Standard Sought By Petitioner In This Case.

Both the soundness of the Coolidge rule, and the inappropriateness of beginning a reconsideration of it on the facts presented here, are only confirmed by examining the cases in which the Court has previously sanctioned investigative activity by police based on less than probable cause. The wholesale abandonment of the probable cause standard urged by petitioner here simply receives no support from those other, easily distinguishable examples.

For example, in Terry v. Ohio, 392 U.S. 1 (1980), in which the Court permitted a departure from the Fourth Amendment's probable cause requirement for purposes of an investigative "stop and frisk," the Court made clear that its decision depended upon

the fact that the investigating officer had reasonable grounds in advance to believe that a crime had been committed (or was in progress) and that the suspect he had stopped was armed and dangerous, and that the frisk was necessary for protection once the suspect had been stopped.

Similarly, in Michigan v. Summers, 452 U.S. 692 (1981), the Court limited the Terry rule to instances in which a police officer, acting on an objectively reasonable suspicion, detains an individual or his possessions in order to: (1) prevent that person's flight in the event incriminating evidence is found; (2) minimize the risk of harm to the officer or others; and (3) complete an otherwise valid "probable cause" search in an orderly manner. Obviously, none of these conditions obtained here. The stereo was not dangerous, or about to flee. It posed no danger to completion of the

lawful "exigent circumstances" search. And Officer Nelson's investigative activities were designed exclusively to inquire whether any crime at all had actually occurred.

In United States v. Place, 462 U.S. 696 (1983), where the Court applied Terry principles to the warrantless seizure of personal luggage from a suspected drug courier at an airport so that it could be exposed to a specially trained dog, the Court relied on the fact that courier activity at airports is "inherently transitory," that opportunities to intercept such couriers are both rare and fleeting, and that the suspect had behaved in an objectively suspicious manner -- by carrying baggage with false addresses, and giving false and evasive answers in response to police inquiries. But, once again, there is nothing inherently transitory, "public", or suspicious about a

fully-connected turntable in a private home.[9]

Most importantly, in each of the cases in which this Court has condoned searches and seizures based on reasonable suspicion, it has required that a showing of "reasonable suspicion" actually be made, based on "specific and articulable facts" justifying the intrusion -- even where those intrusions have occurred in public places, and in areas of heightened governmental regulation or special governmental concern. Terry v. Ohio, 392 U.S. 1, 21 (1968); Delaware v. Prouse, 440 U.S. 648, 655-56 (1979); United States v. Hensley, 469 U.S. 221 (1985); United States v. Montoya De Hernandez, 105 S.Ct 3304, 3311 (1985); New Jersey v. T.L.O., 469 U.S. 325 (1985).

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[9] Similarly, the fact that the search at issue here occurred in a home, rather than a closely regulated public environment like an elementary school, also easily distinguishes New Jersey v. T.L.O., 469 U.S. 325 (1985).

Here, there simply were no such objective facts. Officer Nelson only decided to check the stereo serial numbers "as long as" he was checking the numbers on the guns. He testified unequivocally that his suspicion was based on his impression that the stereo was an incongruous "item of value."[10] This type of generalized curiosity is unacceptable as a basis for finding objectively reasonable

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[10] Petitioner claims in its brief that it was only after the officers recovered guns and a mask, and after Officer Nelson recognized the name of one of the subjects that lived in the apartment from prior police work, that Officer Nelson acted on his suspicions and searched the stereo. While Terry and its progeny allow suspicions to be based on the "totality of the circumstances" (See Terry, 392 U.S. at 21-22; United States v. Place, 462 U.S. 696, 710), what petitioner asserts here is an after-the-fact justification. The officer testified that it was the expensive-looking nature of the stereo in a low-rent apartment that gave rise to his suspicions. (Jt. Appendix at 29). See United States v. Brignoni-Ponce, 422 U.S. 873, 886, n.11 (1975) (specifically rejecting consideration of "after-the-fact" justifications). It also bears noting that, to the extent the officer's actions were based upon an assessment that the stereos' surroundings were "unworthy," his actions are even more constitutionally suspect. See Robbins v. California, 453 U.S. 420, 426-7 (1981).

suspicion and stands in sharp contrast to the highly particularized showings the Court has elsewhere consistently required for searches and seizures based on less than probable cause. Compare United States v. Cortez, 449 U.S. 411 (1981); Texas v. Brown, supra. See United States v. Brignoni-Ponce, 422 U.S. 873 (1975) (rejecting apparent Mexican ancestry as basis for "reasonable suspicion" that particular individuals were illegal aliens).

Moreover, in the specific context of this case, the officer's suspicion was not only based on an unacceptable generalization, but was based on an objectively unreasonable generalization as well. It is readily demonstrable, and well-known, that Americans of all social classes in fact routinely own "items of value" of the sort whose possession Officer Nelson found to be inherently "suspicious." Despite the officer's subjective personal "suspicion," ownership of

personal "items of value" in Officer Nelson's terms -- televisions, radios, and stereos -- is extremely widespread in our society, and the presence of an expensive television or stereo in a home, even in a poorer area, is not remotely "suspicious" or unusual at all.[11]

Because the assumption that persons who live in poor surroundings and own one or two expensive "items of value" necessarily stole them is not sound, as a simple factual matter the police in this case did not have a reasonable suspicion that the stereo in

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[11] For example, in 1985 98% of all households in the United States had a television. U.S. Bureau of the Census, Statistical Abstract of the United States: (1986) at 545 (106th ed.), Washington, D.C. 1985. Moreover, according to a recent industry survey, 88% of current American households have audio systems, and a full 92% have color television sets too. Electronic Industries Association Consumer Electronics Group, Consumer Electronics Annual Review (1986) at 59. Thus, as a simple matter of statistics, it cannot be said that it is unusual -- let alone legally "suspicious" -- to find "items of value" even in poor or low-rent American homes.

Mr. Hicks' apartment was stolen. Basing a search and seizure on "nothing more than inarticulate hunches" -- especially demonstrably fallacious ones -- represents a position "this Court has consistently refused to sanction." Terry, supra, at 22, 27. Thus, this case, on its facts, would necessarily fall outside even the new "plain view" rule for which petitioner argues.

Given its lack of objective, "reasonable suspicion" basis, this search and seizure could not be validated by petitioner's claim that they were "relatively unintrusive", even if that claim were true.[12] In fact, of course,

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[12] In making this argument, petitioner distorts the overall interests that are allegedly to be "balanced." It denigrates Hicks' Fourth Amendment interest, arguing that his stereo was in "plain view", and ignoring that it was in fact fully connected, on a bookshelf, in his private home. Similarly, petitioner exaggerates the government's interest, by attempting to link the need to turn over this stereo with preventing "more insidious crimes of violence." Petitioner's Brief at 28. What this amounts to, however, is saying that the government's interest in preventing and detecting crime should simply override
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even though the officer's actions were relatively brief, that by no means makes them "unintrusive" for Fourth Amendment purposes. If, as stated by this Court in countless decisions, the basic purpose of the Fourth Amendment is precisely to safeguard the privacy and security of individuals in their homes against all arbitrary invasions by government officials, Camara v. Municipal Court, 387 U.S. 523, 528 (1967), then this police activity -- based on nothing more than an inarticulate guess or hunch -- was highly intrusive indeed. It is precisely the type of search the Fourth Amendment was explicitly designed to prevent.

C. A "Reasonable Suspicion" Standard For In-Home "Plain View" Searches Would Not Advance Sound Law Enforcement Policy.

Finally, the approach advanced by petitioner is unwise in its own law

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established Fourth Amendment rules.

enforcement policy terms. It represents a departure from the familiar and easily applied strictures of probable cause that has no clear-cut stopping place -- indeed, no analytically or practically sensible stopping place at all, if its first application were to be in a case like this.

Unlike the Coolidge probable cause rule, in the practical world the "reasonable suspicion" standard that is sought here cannot be administered. At present police officers know that, in the absence of probable cause, they must -- as a "bright line" matter -- adopt a physical "hands off" approach to personal effects located in the home. Adopting the suggested standard would complicate the individual police officer's job by requiring police to be fully knowledgeable concerning two different standards -- probable cause and reasonable suspicion -- for in-home searches and

seizures, rather than just requiring knowledge of the one standard that already is in place. Officers would be required to make several different evaluations as to whether or not there is a sufficient justification to take particular contemplated investigative steps within the home, under the circumstances of their particular lawful entry. The supposed new "bright line" will thus in practice be substantially less "bright" than the current "hands off" probable cause standard for "plain view" searches that has worked well for the past fifteen years. And it is impossible not to believe that the general diminution of respect for personal privacy in the home that would follow such a radical weakening of the probable cause rule would not eventually undermine the meaning of "probable cause" itself.

In reality, the argument from "efficiency" is not about criminal justice administration, but about the "inefficacies" imposed upon police investigators by the Fourth Amendment. But police efficiency has never been a sufficient basis to sanction a departure from the Fourth Amendment's limitations on search and seizure. United States v. United States District Court, supra at 315-16. The probable cause standard for "plain view" searches is clear, well-established, and has worked well. The "exigency" and other carefully drawn exceptions to the Fourth Amendment warrant requirement already provide the flexibility needed to satisfy legitimate law enforcement needs. There is no reason to weaken the substantive standard that Amendment contains as well.

III. EXCLUSION OF EVIDENCE WAS THE PROPER REMEDY FOR THE ERRORS IN POLICE CONDUCT AND JUDGMENT IN THIS CASE.

Relying on United States v. Leon, 468 U.S. 897, 104 S.Ct. 3405 (1984), petitioner argues that exclusion of the evidence obtained through the illegal search of respondent's apartment is an inappropriate remedy in this case. But petitioner's reliance on Leon is misplaced.

First, for the reasons described above, the search and seizure of the stereo and its serial number were not objectively reasonable police conduct as required by Leon. Leon concerned the behavior of law enforcement officers executing a warrant which, it was later found, had, through no fault of the officers, been issued by an independent magistrate without a proper grounding in probable cause. This case, in contrast, is about the police conduct which caused a warrant to be issued. Here, no one denies

that there was probable cause by the time the police actually sought the warrant, and no one suggests the magistrate made an error. The question here is how the probable cause was established by the police.

Petitioner does not even claim that there was probable cause to believe the stereo was stolen at the time Officer Nelson began his search. Police officers know full well that general searches, and rummaging through individuals' personal effects, are presumptively unconstitutional in the absence of a warrant. In view of the clear rule of Coolidge v. New Hampshire, supra, Officer Nelson knew or should have known he was violating an established constitutional rule, and his actions thus fall well outside the "good faith" Leon rule.

Second, even assuming that the officer in this case had acted in a reasonable -- but erroneous -- manner, extension of the "good

faith" exception to the exclusionary rule to this case would require a radical extension of what United States v. Leon actually held. The fact that the officers in Leon had obtained a warrant before they conducted their search provided the basis for the Court's decision to create of a limited "good faith" exception, because the Court held it would be unproductive, in a cost-benefit deterrent sense, to "punish" the police for the magistrate's error of judgment, when the police officers themselves had behaved exactly as they should.

But because this search and seizure were conducted without a warrant, Leon is quite inapposite: If there is an error here, it is plainly the police's own. The deterrent rationale for the exclusionary rule is thus fully and directly applicable here.[13]

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[13] Petitioner's argument that Leon applies because the officer later obtained a search warrant is irrelevant (con't next page)

It will serve the rationale of Leon -- making the police responsible for their own actions and misjudgments -- to affirm the decision below, and it would contradict Leon to absolve the police of their own error simply because they were engaged in a well-intentioned fight against crime.

Subjective good intentions are not the same as constitutional "good faith." If the law were otherwise, there would be no reason to respect constitutional guarantees at all. The exclusionary rule is, without question, the appropriate remedy to apply in this case.

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to the search and seizure of the stereo completed prior to the time the warrant was obtained. United States v. Place, 462 U.S. 696 (1983) (warrant based on information gathered during invalid seizure).

CONCLUSION

For the reasons set forth above, the judgment below should be affirmed.

Respectfully submitted,

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